Central Law Journal.

ST. LOUIS, MO. MARCH 20, 1903.

CIVIL LIABILITY OF UNINCORPORATED LABOR UNIONS AND THE MEMBERS THEREOF.

A question of law of growing interest and importance is involved in the recent case of Taff Vale Railway Company v. The Amalgamated Society of Railway Servants, in which case a verdict of £27,000 has just been rendered against an unincorporated labor union. The House of Lords (1901), A. C. 426, had reversed the ruling of the Court of Appeal that no such action would lie and held that a trade union could be sued for an actionable wrong by its registered name, whether incorporated or not. Lord MacNaghten intimated that it did not even have to be registered. He said: "Suppose there were a manufactory belonging to a co-operative society, unregistered and composed of a great number of persons, and suppose such a manufactory were poisoning a stream, or fouling the atmosphere to the injury of its neighbors, might it do so with impunity? It seems to me that this is a reduction to absurdity. I should be sorry to think that the law was so powerless; and, therefore, it seems to me that there would be no difficulty in suing a trade union in a proper case if it be sued in a representative action by persons who fairly and properly represent it."

Farewell, J., whose opinion in this case is adopted by the house of lords, said that counsel were unable to cite any reported case in which this question had ever been argued or decided. Speaking to the merits of the case Justice Farwell says: "If the contention of the defendant society were well founded, the legislature has authorized the creation of numerous bodies of men capable of owning great wealth and of acting by agents with absolutely no responsibility for the wrongs that they may do to other persons by the use of that wealth and the employment of these agents. They would be at liberty to disseminate libels broadcast, or to hire men to reproduce the rattening methods that disgraced Sheffield thirty or forty years ago, and their victims would have nothing to look to for damages, but the pockets of the individuals, usually men of small means, who acted as their agents. * * * If, therefore, I am right in concluding that the society is liable in tort, the action must be against them in their registered name. The acts complained of are the acts of the association. They are acts done by their agents in the course of the management and direction of a strike; the undertaking such management and direction is one of the main objects of the society, and is perfectly lawful; but the society, in undertaking such management and direction, undertook also the responsibility for the manner in which the strike was carried out. The fact that no action could be brought at law or in equity to compel the society to refrain from interfering in the strike is immaterial; it is not a question of the rights of members of the society, but of the wrong done to persons outside the society. For such wrongs, arising as they do from the wrongful conduct of the society in the course of managing a strike which is a lawful object of the society, the defendant society is, in my opinion, liable."

The position taken by the American authorities on this question, while no case has yet appeared involving the identical question just discussed, strongly points in the same direction. Thus in Carew v. Rutherford, 106 Mass. 1, the plaintiff, a contractor, sued a stonemason's union for a recovery of five hundred dollars which said union had compelled him to pay for sending part of his stone work to be cut by non-union laborers. The president of the association told him he would call all the stonemasons out unless he paid the fine. On the contractor's refusal to pay, he did call them out. The contractor, however, not being able to procure sufficient men to complete his contract on time was obliged to pay the fine in order to complete his undertaking under the contract. In an action to recover the sum thus paid a judgment was rendered for the plaintiff and sustained by the supreme court. The opinion of Chapman, J., in this case is very strong and should be published throughout the length and breadth of the land. He says:

"We have no doubt that a conspiracy against a mechanic, who is under the necessity of employing workmen in order to carry on his business, to obtain a sum of money from him, which he is under no legal liability to pay, by inducing his workmen to leave him, and by deterring others from entering into his

employment, or by the threatening to do this, so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the illegal demand, is an illegal, if not criminal, conspiracy; that the acts done under it are illegal; and that the money thus obtained may be recovered back, and, if the parties succeed in injuring his business, they are liable to pay all the damages thus done to him. It is a species of annoyance and extortion which the common-law has never tolerated."

How clear and unequivocal is this language, and yet how few courts apparently have the courage to apply the law as thus declared. We have known trial judges to almost whimper on the bench when such a case came before them. Some judges, however, put on a bold and blustering front and deny that a labor union violates any law by calling its men out of a certain employment unless the employer in such case complies with certain demands made upon him. They argue that to deny a labor union such right would be an infringement of the liberty of the men composing the association. Listen again to the clear answer of Chapman, J., to this argument.

"Freedom," say, Justice Chapman, "is the policy of this country. But freedom does not imply a right in one person, either alone or in combination with others, to disturb or annoy another, either directly or indirectly, in his lawful business or occupation, or to threaten him with annoyances or injury, for the sake of compelling him to buy his peace. The acts alleged and proved in this case are peculiarly offensive to the free principles which prevail in this country; and if such practices could enjoy impunity, they would tend to establish a tyranny of irresponsible persons over labor and mechanical business which would be extremely injurious to both."

Other authorities in this country are rapidly evidencing an appreciation of the vast importance of this question, and gradually awakening to the fact that to permit certain classes of voluntary unincorporated and irresponsible associations to exercise such power as will enable them to hold every business man or contractor by the throat, and, if he refuses to meet their demands, be they just or exorbitant, to hold the whole country by the throat until the influence of public opinion also shall be brought to bear upon the refractory contractors, would be a calamity that could not be tolerated in a free country. Trusts and labor unions are both institutions that are contrary to all principles of law and liberty, especially when they combine to crush or injure the man who opposes them. Thus, in the recent case of Moores v. Bricklayers' Union, 23 Cinc. L. Bul. 48, 10 Ohio Dec. 665, the plaintiffs, dealers in lime, sued the defendants for issuing an order to contractors that they would not let their men work on any job where lime was used which had been purchased from plaintiff, because the latter had sold lime to certain non-union contractors against their orders. The court held that an action would lie against the members of the union for thus illegally and maliciously conspiring to injure the trade of plaintiff. In Lueke v. Clothing Cutters' Assembly, 77 Md. 396, 39 Am. St. Rep. 421, the court held that where a non-union employee is discharged in consequence of a threat from a labor organization that in case he is retained in the service it will be compelled to notify all the labor organizations of the city that the business house of the employer is a non-union one, and thus subject him to great loss, an action will lie by the non-union employee for the damage he has sustained in consequence of such discharge. Just the opposite conclusion was reached by the appellate division of the New York Supreme Court in the case of National Protective Association v. Cummings, 53 N. Y. (App. Div.) 227. This case, however, is evidently overruled by the case of Curran v. Galen, 152 N. Y. 33, 46 N. E. Rep. 297, 37 L. R. A. 802, where the court sustained the right of an employee to sue a labor union for procuring his discharge. In Massachusetts, also, the courts hold with the Maryland case that an employee has a right of action against a labor union for maliciously procuring his discharge. In England, however, after much controversy among the judges, the question may be considered settled for the present as opposed to the right of recovery by the employee in such case. Allen v. Flood (1898), A. C. 1.

It is quite evident from these authorities that a new question is agitating the country, —the right of courts and legislatures to restrain the growing and dangerous power exercised by what are known as labor unions,

and the responsibility of such organizations, whether incorporated or not, to a suit for damages. In New York the Code authorizes an action against an unincorporated labor union or other association by service on its president or treasurer. But in any case, the right to sue a labor union for any actionable wrong committed by it, is now completely recognized. While we sympathize with the merchant and with the laboring man who, together, are striving to develop the industries of the country, we cannot too severely deprecate the attempts of either of them to exercise a tyranny over the other, and by unfair combination and conspiracy to coerce the other, against his will, to comply with any demands the former may see fit to make. The law must certainly look with disfavor upon all attempts of that character and must follow them with its severest penalities.

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW—RIGHT TO PROHIBIT THE GRAZING OF SHEEP ON THE PUBLIC DOMAIN.—The police power is evidently the most convenient reason upon which to justify a violation of the constitution by the legislature. From the wide extent to which this power has been stretched by the courts it would appear that not even the most sacred provisions of our constitutions, either state or federal are safe from this insidious destroyer. In the recent case, for instance, of Sweet v. Ballentine, 69 Pac. Rep. 995, the Supreme Court of Idaho upheld the validity of a state statute prohibiting the grazing and herding of sheep on the public domain within two miles of inhabited dwellings. This was in affirmance of its former decision in the case of Sifers v. Johnson, 65 Pac. Rep. 709, 54 L. R. A. 785. While we doubt the constitutionality of such legislation, at least as far as the federal constitution is concerned, we recognize the plausible reasons assigned by the trial court for the expediency of such legislation. The court says:

"It is a matter of public history in this state that conflicts between sheep owners and cattlemen and settlers were of frequent occurrence, resulting in violent breaches of the peace. It is also a matter of public history of the state that sheep are not only able to hold their own on the public ranges with other live stock, but will in the end drive other stock off the range, and that the herding of sheep upon certain territory is an appropriation of it almost as fully as if it was actually inclosed by fences, and this is especially true with reference to cattle. The legislature did not deem it necessary to forbid the running at large of sheep altogether, recognizing the fact that there are in the state large areas of land uninhabited, where sheep can range without interfering with the health or subsistence of settlers, or interrupting the public peace. The fact was also recognized by the legislature that, in order to make the settlement of our small isolated valleys possible, it was necessary to provide some protection to the settler against the innumerable bands of sheep grazing in this state. Settlers need the use of the range in their immediate vicinity for their domestic animals. Families living on small farms must of necessity keep some live stock. A milch cow is a necessity to the isolated family living on a small farm miles from market. Recognizing that, if sheep were permitted to graze at will in the settled portions of the state, settlers could not go into the small valleys and build up homes, the legislature passed the statutes in question in order to encourage the settlement of wild lands in this state. Moreover, the said statutes were passed to promote good order, and preserve the public peace, and to prevent those recurring conflicts between settlers and the owners and herders of sheep so common in the past. Viewed as a measure to preserve good order and peace, to prevent conflicts which violate the peace, to protect the health and comfort of citizens of the state, and to promote and encourage the settlement and development of the state, the said statutes are wise and beneficient, and must be so recognized by all persons who are acquainted with the conditions in this state, past and present. Nullify the statutes in question, or emasculate their provisions by holding that they are unconstitutional, or that a settler cannot recover damages by reason of sheep destroying all the forage grasses around him, and the beneficient objects of the statutes are defeated; and the result will be, in the end, that isolated settlements must be abandoned, and the land in the state become one immense sheep pasture, to the detriment of the farming and mining interests; and settlement of the public lands will be retarded; the building up of homes on the public domain will almost stop."

While the argument of the court thus stated shows the practical expediency of such legislation to some extent it does not justify it under the provisions of the United States constitution. That instrument guarantees to every one the equal protection of the law, and that neither his liberty nor his property shall be taken away without a due process of law. It would be a mockery and legal travesty to say that a state, in the face of the fourteenth amendment, could deny to sheep raisers the right to graze their stock on the public domain of the United States while raisers of other kinds of cattle were not so denied. Sheep raising is as much a legitimate business as cattle raising, and the public domain of the United States is open to both of them without restriction, and neither of them can possibly obtain a superior right therein without violating the constitutional right of the other. Stockslager, J., dissenting in this case, thus vigorously expresses himself:

"Is it an exercise of the police powers of the state to say that, when the horses eat the grass upon the public domain, it has no value, and the resident cannot recover the value thereof, while, if sheep eat it, it has a value, and the resident can recover the value of the same? Undoubtedly, residents can and should recover for trespasses upon their individual lands, but here is a statute which gives damages because of the eating of the grass upon the public domain, provided the eating is by sheep. Is this a police regulation, or an attempt to fence off by statute a certain portion of the public domain for the convenience of cattlemen, horsemen, or ranchers, or any one except owners of certain kinds of herds?

The opinion of the majority of the court is to the effect that not only may you prohibit sheep from grazing within two miles of a residence, but the resident is entitled to the value of the grass which may be destroyed or eaten by sheep within two miles of a residence, although this grass be growing upon public domain. It is certainly clear to the unprejudiced mind that this grass does not belong to the resident, or to any other stock men. They have no property interest in it whatever. Yet here is a statute by which they may sue and recover the value of that which does not belong to them and in which they have no interest. It belongs to the government, which, by license, all are permitted to enjoy; yet this statute, as now construed, permits parties to recover the value thereof (the grass), although it is not his, and never was, and permits him to recover it, not from any one who may take it, but from the sheep men alone. Any other individual may graze it off, cut it off, burn it off, and the resident cannot complain; but, if a sheep owner takes it, it immediately has a value to the resident, and he is entitled to recover the full price thereof. I do not think that this is in any sense a police regulation, or equal protection under the law. It is the most vicious form of class legislation, and it will not do to call such apparent violation of the fundamental rules of right a legitimate exercise of the police power of the state. Classifications, when made, must be based upon some rule of substantial difference which of itself naturally makes the distinction."

RAILROADS—LIABILITY FOR FURNISHING DEFECTIVE CAR TO CONNECTING LINE.—The Supreme Court of Kansas has overruled itself on a very interesting point of law,—the liability of a railroad in furnishing a defective car to a connecting line. In its first decision it held the railroad so liable. Railway Co. v. Merrill, 61 Kan. 671, 60 Pac. Rep. 819. On a subsequent hearing this view was overruled. Missouri, K. & T. Ry. Co. v. Merrill, 70 Pac. Rep. 358. In this decision the court holds the law to be that a railway company, which delivers a defective freight car to a connecting line, is not liable in damages to an employee of the latter, who is injured by reason of such defects, after the car has been inspected by the company receiving it.

In the first decision it was held to be within the contemplation of the first carrier that the car would be delivered to another for transportation and it was also known that connecting carriers employ switchmen to handle such cars. "With this knowledge," the court said, "it was the duty of both plaintiffs in error to provide a car which would be reasonably safe for the service to be performed and for employees of connecting lines to handle, to the end that freight might be expeditiously carried to its destination. * * * Negligence on the part of the Chicago Great Western Railway Company will not excuse the plaintiffs in error either for their failure to inspect, or, having inspected the car, permitting it to be delivered to a connecting line in a condition which might be dangerous to switchmen and other employees engaged in the practical part of the business of railway transportation." In the second opinion the court makes the following frank admission: "We are now fully convinced that the doctrine announced in the former decision on the subject in hand runs counter to an unbroken current of authorities, and fails to stand the test of reason."

That the question in this case is one of great importance cannot be denied and the authorities show that the courts themselves find it, under some circumstances, very difficult of solution. The question may first be looked at as a question of negligence. It is a well known principle of negligence that there must be a chain of casual connection between the act of negligence and the injury. Thus, where defendant illegally sold gunpowder to a child, but the child gave all the powder to its parents, who afterward gave part of it to the child, the defendant was held not liable because the act of the parents destroyed the casual connection between defendant's original negligence and the final injury. This same principle is applicable to the question before us. There being a positive duty resting on the receiving railway company to inspect the car turned over to it for transportation by another company, to the end that its employees may not be injured by defects existing before its receipt, the omission or negligent discharge of such duty breaks the causal connection between the negligence of the company tendering the defective car and the plaintiff's injury. In such cases the failure to inspect, or the negligent manner of doing it, is the proximate cause of the injury to the employee, and the negligence of the company turning over the unsafe car is the remote cause. The failure to discharge the obligation to inspect interposes an independent agency, which severs the casual connection between the company first guilty of negligence and the hurt. It was so held in Fowles v. Briggs, 116 Mich. 425, 74 N. W. Rep. 1046, 40 L. R. A. 528, 72 Am. St. Rep. 537, a case very similar to this. See, also, Lellis v. Railroad Co., 124 Mich. 37, 82 N. W Rep. 828. The duty of a railway company to inspect cars of other roads received by it is enjoined

by law. Railway Co. v. Barber, 44 Kan. 612, 24 Pac. Rep. 969; Railroad Co. v. Penfold, 57 Kan. 148, 45 Pac. Rep. 574; Railroad Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. Rep. 777, 42 L. Ed. 1188. Other cases opposed to the decision in the principal case will be found to be cases where by *special* contract the duty of inspecting the cars was on the forwarding carrier or else by the agreement between them they were virtually partners in their connecting arrangements. Such were the cases of Moon v. Railroad Co., 46 Minn. 106, 48 N. W. Rep. 679, 24 Am. St. Rep. 194; Railroad Co. v. Snyder, 55 Ohio St. 342, 45 N. E. Rep. 559, 60 Am. St. Rep. 700; Heaven v. Pender, 11 Q. B. Div. 503; Railroad Co. v. Booth, 98 Ga. 20, 25 S. E. Rep. 928, all of which cases the court in the principal case cited in support of its first decision.

A better reason, however, for denying the right to recover in cases like the present is that the liability to a servant ceases with the control of the master over his actions. In Glynn v. Railroad Co., 175 Mass. 510, 56 N. E. Rep. 698, 78 Am. St. Rep. 507, the plaintiff was in the employ of the New York, New Haven & Hartford Railroad Company, in Connecticut, and was injured while coupling a car belonging to a New Jersey railway company, which had a defective coupling apparatus. He sued the latter company. The court, in holding the defendant not liable, said: "There was no dispute that, after the car had come into the hands of the New York, New Haven & Hartford Railroad, and before it had reached the place of accident, it had passed a point at which the cars were inspected. After that point, if not before, we are of opinion that the defendant's responsibility for the defect in the car was at an end. * * * But when a person is to be charged because of the construction or ownership of an object which causes damage by some defect, commonly the liability is held to end when the control of the object is changed." This rule is supported by the following authorities: Clifford v. Cotton Mills, 146 Mass. 47, 15 N. E. Rep. 84, 4 Am. St. Rep. 279; Sawyer v. Railroad Co., 38 Minn. 103, 35 N. W. Rep. 671; Wright v. Canal Co., 40 Hun, 343; Mackin v. Railroad Co., 135 Mass. 201. In Winterbottom v. Wright, 10 Mees. & W. 109-114, the defendant had contracted with the postmaster general to provide a coach for carrying the mail, and agreed to keep it in repair, and fit for use. Other persons had a contract with the postmaster general to supply horses and coachmen for conveying the coach. The vehicle broke down, and injured the driver, by reason of the negligence of the defendant in failing to keep it in proper repair and fit for use. Lord Abinger said: "There is no privity of contract between these parties; and, if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." See, also, as sustaining the same rule: Collins v. Seldon, L. R. 3 C. P. 495; Heizer v. Manfg. Co., 110 Mo. 605, 19 S. W. Rep. 633, 33 Am. St. Rep. 482, 15 L. R. A. 821.

The court in the principal case sums up the question in the following clear and logical statement: "A railroad owes a duty to their own servants to see that the cars put in their charge were in a reasonably safe condition and in proper repair, but to extend this duty to every servant of every other railroad in the United States under whose charge defective cars might come would be to formulate a new rule of liability for negligence not sustained by reason or authority."

WHETHER A SALE ATTACKED FOR FRAUD OF VENDOR WILL BE SET ASIDE FOR INADEQUACY OF PRICE ONLY, WHERE THE CONSIDERATION WAS A SMALL DEBT OF THE VENDEE AND HIS VERBAL PROMISE MADE TO THE VENDOR ALONE TO PAY CERTAIN OTHER DEBTS OF THE VENDOR, FOR WHICH THE VENDEE WAS LIABLE AS SURETY, AT THE TIME OF THE PURCHASE?

When the fraud of the vendor is established, to constitute the vendee a *bona fide* purchaser he must prove the adequacy of the consideration paid for the property. This plea is an affirmative plea in this, the vendee must show satisfactorily the existence, amount, and justice of his debt, and the payment of value for the property fraudulently conveyed.[1] He must either pay the purchase money before notice of the fraudulent purpose of the seller,[2] or, if his undertaking is to pay the debt of the vendor owed a third person, he must irrevocably bind himself to do so, and must be substituted as debtor in place of his vendor. The debt of the vendor must be extinguished, the vendor must be released from all liability, before such debts can be considered any part of the price or consideration.[3]

The promise made the vendor to pay his debt owed a third person, is not a promise to pay the debt of a third person. It is merely a promise to pay the purchase price to one, other than the vendor, and hence not within the statute of frauds.[4] It is wanting, though, in one of the essential elements necessary to constitute such promise a part of the consideration money; viz., the absence of the vendor's creditor's consent to

[1] Richards v. Vaccaro, 67 Miss. 519; Atkinson v. Greaves, 70 Miss. 45; Bamberger v. Schoolfield, 40 Law Ed. U. S. Rep. 379.

[2] Wait on Fraudulent Con., sec. 369, p. 485; 8 Ency. Law, 1 Ed. 756; 2 Pomeroy Equity, sec. 750.

[3] 2 Pomeroy, sec. 751, note 1 citing authorities; Pollock v. Simmons, 76 Miss. 210; Bank v. Strouse, 66 Miss. 484 citing authorities.

[4] Ware v. Allen, 55 Miss. 547.

the novation. There must be a surrender and extinguishment of the vendor's debt, and the acceptance of the vendee's promise alone to pay the purchase price to the vendor's creditor. For this reason it fails as an assignment and transfer of the purchase money to the vendor's creditor.

The written obligation of the vendee given to the vendor alone, reciting as a part of the consideration money a promise to pay the debts of the vendor owed other creditors is equally ineffectual as the vendee's verbal promise, for it still leaves the vendor's debts unpaid, still leaves them in full force, and destroys the idea that such debts constitute any part of the consideration money of the sale.

The oral obligation of the vendee is just as binding as his written obligation to pay the debts of the vendor to third party creditors. Both are legal obligations *inter sese*, and may, at any time, be assigned or transferred to the vendor's creditors, by the creditors consenting to surrender and extinguish the debts of the vendor and accept in lieu thereof this debt of the vendee for the purchase money. Until that is done, though the two classes of debts remain distinct and independent of each other, the purchase money debt remains the property of the vendor, and the vendee has neither paid any of this part of the consideration, or irrevocably bound himself to do so. If, when the transaction or obligation is in this shape, the goods be seized by attachment or otherwise and taken away from the vendee, neither the vendor nor his creditors, thus sought to be protected, could recover the purchase money debt from the vendee. The plea of the failure of consideration would be a good defense for the vendee thus circumstanced.

This being unquestionably the general law, the question directly under inquiry is, what effect would the verbal promise of the vendee to pay the vendor's debts, when he was already liable as surety for such debts, have on the sale when attacked for inadequacy of price as only evidence of fraud in hands of vendee, the fraud of the vendor being conceded? The vendee's plea would be that of a *bona fide* purchaser for value, with the *onus* on him to show that he paid, or irrevocably bound himself to pay, an adequate price for the goods. His being legally liable to these same creditors of his vendor on another and distinct obligation from that growing out of the sale, could in no way affect these creditors' rights and claims against his vendor. His vendor still remains liable on these debts which, as vendee, he was to pay as part of the consideration of the sale. The fact that the vendee is liable also as surety for these same debts, neither pays them, or in any other way releases the vendor from liability. This suretyship of the vendee adds no additional force or efficacy to the verbal or written promise made to the vendor to pay the purchase price of the goods, by paying these debts to the vendor's creditors. *Inter sese* between vendor and vendee, the liability of suretyship, through the new promise, no more pays or extinguishes these debts than the liability of suretyship would inhibit the payment or extinguishment of these debts being used as a consideration of the sale.

Between the vendee and vendor's creditors the liability of suretyship could not have the legal effect to extinguish their debts against the vendor, perforce this agreement between the vendor and vendee that the relationship of principal and surety as between them should be reversed as to these debts. The private agreement between vendor and vendee does not concern the vendor's creditors; they had the same rights before this private agreement as they had afterwards. The general rule, as stated before, applies in all its force, for before the transaction can constitute any part of the consideration of sale, the vendor's creditors must change their position, must make the concession by giving up their debt against the vendor.

W. H. CLIFTON.

LIABILITY OF LANDLORDS FOR DANGEROUS CONDITION OF LEASED PREMISES.

The modern law of landlord and tenant reflects the harshness of the feudal system. The tenant under that ancient method of land tenure must render to the overlord services, in default of which the estate was defeated; he could not alien without the lord's consent and he was burdened with fines and cumbersome incidents of tenancy. Today the lessee must beware lest he, by annexing his chattels to the freehold, lose his ownership in them, to the landlord's advantage; he must continue to pay rent during his term, after the building he rented for a home has become a heap of ashes; he must repair the premises and can claim no damages from his landlord for failure on the part of the latter to render the abode habitable.

In the following pages we shall consider what is the liability imposed upon a landlord for defects and dangerous conditions in the premises, and in what instances he may be held to answer in damages as for a tort. For it must be carefully remembered that although there is no implied contract or covenant by the lessor that the premises are safe, sound or habitable, and while the rule is firmly established that the tenant takes the premises exactly as he finds them, and subject to all their apparent defects,[1] still there is a broad responsibility

[1] Franklin v. Brown, 118 N. Y. 110, 6 L. R. A. 770, 23 N. E. Rep. 126; Perez v. Raybaud, 76 Tex. 191, 7 L. R. A. 620, 13 S. W. Rep. 177.

resting upon the landlord, arising *ex delicto* for negligence or the creation of a nuisance, which is independent of contract and is imposed solely by operation of law.

When, therefore, may the landlord be made to answer in damages in an action on the case, at the instance of his tenant or of a stranger? The theory upon which the law proceeds in exonerating the landlord from liability for defects, is that he who has the possession, is under a duty to render the premises safe. If the owner retains possession, or the leasing is of such a character that it cannot fairly be said that the tenants obtain possession to a particular part, the reason and the rule fail. Thus it has been held that if the premises are leased to different tenants and they are permitted, under the contract, to use the roof in common, the landlord must repair it, and if he does not and a tenant or third party is injured because of his neglect, the lessor is liable.[2] The same rule is applied to passage ways used by all tenants, but which the landlord is under a duty, implied in law, to keep free from dangerous obstructions.[3] This general doctrine, however, does not purport to lay an absolute responsibility upon the owner of the premises, but only requires that he make careful inspection to determine, from time to time, if the common portion is in need of repair. His examination should be more than casual but need not be critical.[4] Similarly, if the landlord in control of a part of the premises uses that portion negligently to the detriment of his tenants, he is liable by elementary principles for the damaging consequences of his acts,[5] or if, being out of possession, he assists the tenant in the creation of a nuisance upon the land, by authorizing the lessee to build a dangerous structure and actively participating in its erection.[6]

Where there is no question as to authorizing or creating a nuisance, the landlord may still make himself answerable in damages for his negligence, though he be out of possession and under no duty to enter and repair or alter the premises. He may be sued in tort if he actually undertakes to make repairs upon premises occupied by his tenant (whether with or without solicitation from the latter and whether gratuitously or for a consideration) and in so doing is negligent; thus inflicting damage on the occupant. This rule depends not upon the contract relation between the parties, nor is it peculiar to the relationship of landlord and tenant. It is an application of the broader principle that where a party undertakes the performance of an act at the request or with the consent of another and in the doing of it is guilty of carelessness, amounting to misfeasance, he is liable to the person injured by reason of such negligent performance. Chancellor Kent announced the doctrine by saying. "A distinction exists between nonfeasance and misfeasance; that is, between a total omission to do an act which one gratuitously promises to do, and a culpable negligence in the execution of it. It is conceded in the English as well as the Roman law that, if a party makes a gratuitous engagement and actually enters upon the execution of the business, and does it amiss, through want of due care, by which damage ensues to the other party, an action will lie for this misfeasance."[7]

It has been said that "when one man does another an injury by unskillfully and improperly doing what he had promised to do, an action may be maintained to recover the damage, although there was no consideration for the promise * * * If instead of *assumpsit* a special action on the case had been brought for misfeasance, it is very clear that no consideration need have been alleged or proved. The gist of such an action would have been the misfeasance, and it would have been wholly immaterial whether the contract was a valid one or not."[8] The application of this principle has frequently been made to cases where landlords, under no duty to repair the rented premises, have nevertheless undertaken to do

[2] Wilcox v. Zane, 167 Mass. 306, 45 N. E. Rep. 523; O'Connor v. Andrews, 81 Tex. 28, 16 S. W. Rep. 628.

[3] Wilber v. Follansbee, 97 Wis. 577, 72 N. W. Rep. 741, 73 N. W. Rep. 559; Leydecker v. Brintnall, 158 Mass. 292, 33 N. E. Rep. 399; Lynch v. Swan, 167 Mass. 510 (*semble*) 46 N. E. Rep. 51.

[4] Lenz v. Aldrich, 39 N. Y. Supp. 1022, (clothes poles becoming rotten).

[5] Railton v. Taylor, 20 R. I. 279, 39 L. R. A. 246, (R. I.), (use of basement for furnace purposes).

[6] Riley v. Sampson, 83 Cal. 217, 7 L. R. A. 622, 23 Pac. Rep. 293.

[7] 2 Kent's Com. star pages 569, 573; Elsee v. Galward, 5 D. and E. 143.

[8] Bender v. Manning, 2 N. H. 289, 291; Accord, Thorne v. Deas, 4 Johns, 84, 86.

so, and have performed the work carelessly.[9] Thus, the landlord has rendered himself liable by negligently renovating some portion of a vault upon the premises; as where he repairs the top board seat, but in replacing it, drives the nails back into the old holes, whereby the seat is rendered insecure;[10] where the seat is reconstructed but is left in a dangerons condition;[11] or where the outhouse and an approach thereto are in a defective condition, and the owner of the property, after his attention has been called to the same, undertakes to repair but the work is insufficiently performed; whereby the floor of the vault falls.[12] So, too, there is liability on the part of the owner if the negligence has occurred in the repair of the foundations of the building; as where the upper floors are insecurely supported during the progress of alterations.[13]

The severity of this doctrine appears in a statement of a New York court, holding that "if with tenants in the building, the defendant (landlord) desired to make repairs, affected the supports and foundations of the building, he was bound to use the greatest degree of care, not merely ordinary care, because he is bound to us this degree toward persons to whom he owes no duty; and if, by his alterations he endangers the safety of his tenants he does so at his peril, and cannot shield himself from responsibility after a catastrophe has happened by saying, 'I used ordinary care, and employed skillful mechanics, but in spite of all, for some unknown reason, the building fell.' The presumption in such a case would be that the building fell because of the repairs, and unless the landlord could show what the cause was, and that he was in no degree responsible for it, such presumption would remain. * * * If the landlord assumes to meddle with the supports of an occupied building, he does so at his peril; and if an accident is caused thereby, and his tenants are injured, to whom he owes the duty of leaving them in quiet possession, the least that can in justice be required is, that he should show that he has exercised the highest degree of care and that, nothwithstanding such care, the accident has occurred."[14]

Repairs upon a roof of a building occupied by tenants will subject the landlord to liability if the tenants are damaged by reason of the negligence in making the alterations;[15] and the same doctrine has been applied even though the lease contained an express stipulation to the effect that: "The landlord shall not be liable for any damage caused by leakage of water, or for any cause or event."[16] Similarly it has been decided that where the landlord undertook to repair a defective porch and performed the work carelessly, he was liable;[17] that where he undertook to clean a cess-pool upon the premises, and after taking out several pails full, removed his appliances and carefully replaced the cover upon the well, he was answerable to the tenant who stepped on the cover and was injured;[18] that where the landlord placed props against a wall, which the tenant had notified him was cracked, and the wall fell, there was a duty on the landlord's part to repair properly, if he undertook to repair at all;[19] and that the owner of premises was liable to his tenant (a bookseller) where he attempted to repair the water pipes, conducting water from the roof, but in doing so left a loose joint in one of the pipes; through which aperture water escaped and damaged the plaintiff's books.[20] In a recent Indiana case the landlord had entered upon the premises to repair a well and carelessly left it uncovered and unguarded during the night. A guest of the tenant fell into the well; he recovered in tort against the landlord. The court expressly placed their decision upon the ground that the landlord committed an affirmative wrong in creating a dangerous condition; and they lay out of the

[9] Barrows on Negligence, pp. 313, 316; Wharton on Negligence, section 792; Bevan on Negligence (2d Ed.), vol. 1 p. 488; Buswell on Personal Injuries (2d Ed.), p. 137; Taylor on Landlord and Tenant (8th Ed.), p. 195, sec. 175. And see Blake v. Dick, 38 Pac. Rep. 1072, 1074, 15 Mont. 236.

[10] Little v. Macandras, 29 Mo. App. 332, 334; Little v. Macandras, 28 Mo. App. 187, 190.

[11] Gill v. Middleton, 105 Mass. 477, 7 Am, Rep. 548.

[12] Gregor v. Cady, 82 Me. 131, 19 Atl. Rep. 108.

[13] Butler v. Cushing, 46 Hun, 521.

[14] Judge v. Cushing, 50 Hun, 181, 186, 187. And see Hine v. Cushing, 53 Hun, 519.

[15] O'Rourke v. Feist, 59 N. Y. Supp. 157; Evans v. Murphy, 40 Atl. Rep. 109; Wertheimer v. Saunders, 95 Wis. 573, 70 N. W. Rep. 824; Sulzbacker v. Dickie, 51 How. Pr. Rep. 500.

[16] Randolph v. Feist, 52 N. Y. Supp. 109.

[17] Wilcox v. Hines, 100 Tenn. 545, 46 S. W. Rep. 297.

[18] Riley v. Lissner 160 Mass. 330, 35 N. E. Rep. 1130.

[19] Lynch v. Oxtleib, 87 Tex. 590, 28 S. W. Rep. 1017.

[20] Worthington v. Parker, 11 Daly, 545.

case altogether the fact that the defendant had covenanted to repair.[21]

The cases thus far considered were those in which the landlord either retained possession of the whole or part of the premises, or where he took possession temporarily for the purpose of making repairs or alterations. The law goes yet further and imposes a liability where he releases the entire possession to the tenant and does not re-enter, but the premises were in a defective or dangerous condition when leased; this fact being known to the lessor, and not known to nor reasonably discoverable by the lessee, and the former conceals the true condition from the latter. Whether there is active misrepresentation or fraudulent concealment, the liability equally results. The rule has most frequently been applied to defects in portions of the premises which the tenant would not be likely to and did not discover; to cases of defective sidewalks;[22] vaults,[23] and cess-pools.[24] The theory upon which these decisions proceed is that while no responsibility arises out of a contract express or implied, there is a strict common law liability for a tort, in using the property in a harmful way; and an application is made of the maxim *sic utere tuo ut alienum non laedas*.[25] A clear statement of the rule is found in a recent Kansas decision where the landlord was held liable for injuries sustained by the lessee's wife who fell through the defective covering of a well. The court say: "The owner of premises upon which is situated a structure or building dangerous either by reason of defective construction or from long use, of which the owner has knowledge or which defect is not obvious or discoverable by the exercise of ordinary care, cannot escape liability to a tenant from whom he conceals such defect or a member of his family, who, not knowing of such defect, and while in the exercise of ordinary care, is injured by the falling of such building or structure."[26]

[21] Barman v. Spencer (Ind.), 44 L. R. A. 815, 49 N. E. Rep. 9.

[22] Leydecker v. Brintnall, 158 Mass. 292, 33 N. E. Rep. 399.

[23] Cake v. Gutkese, 80 Ky. 598; Martin v. Richards, 155 Mass. 381, 29 N. E. Rep. 591.

[24] Cowen v. Sunderland, 145 Mass. 363, 14 N. E. Rep. 117; Kern v. Myll, 80 Mich. 525, 8 L. R. A. 682, 45 N. W. Rep. 587.

[25] Kern v. Myll, 80 Mich. 525, 8 L. R. A. 682, 45 N. W. Rep. 587.

[26] Moore v. Parker, 63 Kas. 52 53 L. R. A. 778. (Kas.), 33 Cent. L. J. 246.

The same doctrine is invoked where the premises are infected with a contagious disease and the landlord conceals the fact.[27] So rigidly has this rule been enforced that where the premises were not defective when first rented, but became so during the tenancy, and the landlord re-let them from year to year, he was held liable to a stranger, if at the commencement of any year for which the property was rented there were dangerous defects therein.[28] Whether the lessor would be liable under these circumstances to the tenant would depend upon whether the defect were one known to, or discoverable by, the tenant at the time of renewing the lease, and whether the landlord had actual or constructive notice of its existence at that time. In no case, however, would a covenant by the tenant to repair, operate to release the landlord from responsibility to third persons, if he would have been liable in the absence of such covenant.[29]

Considerable discussion has arisen whether the landlord must actually know of the defects and dangerous conditions existing when he leases the premises, or if his failure to make reasonable inspection of them will charge him with responsibility for such conditions discoverable by due diligence. The better rule is, that his knowledge may be actual or constructive; and the latter arises where he neglects to make reasonable investigation. Such was the decision in the carefully considered case of Hines v. Wilcox.[30] In a subsequent affirmance of this decision it was said: "It is strenuously insisted that no active duty devolves upon the landlord to ascertain such hidden defects and dangers, and in the absence of actual knowledge the landlord will not be liable for any damages. The logic of this proposition is, that a landlord is under no obligation to know anything about the condition of his premises, — whether they are dangerous or safe, whether habitable or a nuisance, — and so long as he keeps himself ignorant either intentionally or negligently,

[27] Minor v. Sharon, 112 Mass. 477; Gesar v. Karutz, 60 N. Y. 229.

[28] Matthews v. De Groff, 43 N. Y. Supp. 237.

[29] Matthews v. De Groff, 43 N. Y. Supp. 237.

[30] Hines v. Wilcox, 96 Tenn. 148, 33 S. W. Rep. 914, 34 L. R. A. 824. Affirmed in Wilcox v. Hines, 41 L. R. A. 278, 34 S. W. Rep. 420, 96 Tenn. 328, and Sternberg v. Wilcox, 96 Tenn. 163. 34 L. R. A. 615. 33 S. W. Rep. 917, 34 S. W. Rep. 420 See Cent. L. J. 388.

he cannot be held liable for any damages resulting from the dangerous condition of his property when leased; but, if by accident or examination, he becomes aware that a second defect does exist, then he is liable if he fail to disclose it. Under this ruling the landlord is placed in the better condition, the more negligent and inattentive he is, and a premium is put upon his ignorance. * * * It is not upon the ground of an insurer or warrantor of condition under his lease contract, but on the ground of the obligation implied by law, not to expose the tenant or the public to danger which he knows, or in good faith should know, and which the tenant does not know and cannot ascertain by the exercise of reasonable care and diligence."[31] It will be noticed that this qualification makes important in-roads on the doctrine of non-liability of landlords for defects in premises at the time of leasing, but is not inconsistent with that doctrine as a whole.

Another instance of the landlord's responsibility, though he is out of possession, is found in leases of premises for public or *quasi*-public purposes, and the lessor, at the time of the demise, knows the purposes for which the premises are demised, and is aware of the defects rendering them dangerous for such use; the tenant being ignorant of the condition. The rule has been applied to the letting of wharves, defective in some respect unknown to the tenant.[32] It by no means follows that because a landlord is exempt from liability to his tenant, he cannot be sued successfully by a stranger to the lease, for injuries due to defects in the demised premises. The tenant may be aware of the dangers and may himself be liable; and if the landlord leased the property having upon it at the time a nuisance or that which in the nature of things must become a nuisance if the premises are used for the purpose intended, and known by the landlord to be intended, the lessor is answerable to third parties who are damaged. Thus, liability has been imposed where, at the time of leasing, the property was made dangerous to the public or the neighborhood by a defective wharf,[33] by an awning, dangerously projecting from a building,[34] defective water pipes,[35] a coal hole insecurely fastened,[36] a mill, with a mill wheel calculated to frighten horses by its movements,[37] a badly constructed warehouse, insufficient for heavy storage,[38] a dangerous wall,[39] and a cess pool.[40] It is immaterial whether the landlord creates the nuisance or lets premises which harbor a nuisance created by another. If the lessor knows, actually or constructively, of its existence at the time of leasing he is liable.[41] Nor is it important that the lessee has covenanted to repair the property or save the lessor harmless from all damages to third parties.[42] By the mere fact of letting the premises the landlord authorizes the continuance of the nuisance and makes himself responsible for its effects.

In the above considered cases the owner is held in damages for injuries to his tenants or to strangers. The tenant, has no right against his landlord where the premises are in a defective condition when leased, and the tenant might, by the use of reasonable care, have perceived the defects;[43] and if the tenant himself could not recover neither can his sublessee.[44] The same freedom from responsibility exists where the premises deteriorate after entry by the tenant. The general rule, first above stated, then governs, for "A landlord who is out of possession of the premises by virtue of a demise,

[31] Wilcox v. Hines, 96 Tenn. 328, 34 S. W. Rep. 420, 41 L. R. A. 278, 280, 281. Accordingly see Metzger v. Schultz, 16 Ind. App. 454, 460, *semble*, 43 N. E. Rep. 886, 45 N. E. Rep. 619; Cutter v. Hamlen, 147 Mass. 471, 18 N. E. Rep. 397; Martin v. Richards, 155 Mass. 381, 29 N. E. Rep. 591; Leydecker v. Brintnall, 158 Mass. 292, 33 N. E. Rep. 399; Timlin v. Standard Oil Co., 126 N. Y. 514, 27 N. E. Rep. 786; State v. Boyce, 73 Md. 460, 21 Atl. Rep. 322.

[32] Albert v. State, 66 Md. 325, 7 Atl. Rep. 697; Swords v. Edgar, 59 N. Y. 28; Joyce v. Martin 15 R I. 558, 10 Atl. Rep. 620.

[33] Joyce v. Martin, 15 R. I. 558, 10 Atl. Rep. 620.

[34] Nugent v. B. C. & M. R. R. Co., 80 Me. 62, 12 Atl. Rep. 797.

[35] Ingwersen v. Rankin, 47 N. J. L. 18.

[36] Delay v. Savage, 145 Mass. 38, 12 N. E. Rep. 841.

[37] House v. Metcalf, 27 Conn. 631.

[38] Carson v. Godley, 26 Pa. 111.

[39] Timlin v. Standard Oil Co., 126 N. Y. 514, 27 N. E. Rep. 786.

[40] Fow v. Roberts, 108 Pa. 479.

[41] Knaus v. Brua, 107 Pa. 85; Wunder v. McLean, 134 Pa. 334, 19 Atl. Rep. 749.

[42] Ingwersen v. Rankin, 47 N. J. 18; Nugent v. R. R. Co., 80 Me. 62, 12 Atl. Rep. 797.

[43] Harpel v. Fall, 63 Minn. 520, 65 N. W. Rep. 573; Booth v. Merriman, 155 Mass. 52, 30 N. E. Rep. 85; Monyhan v. Allyn, 162 Mass. 270, 38 N. E. Rep. 497; Davidson v. Fisher, 11 Colo. 583, 19 Pac. Rep. 652.

[44] Smith v. State, 92 Md. 518, 51 L. R. A. 772 (Md.) 48 Atl. Rep. 92.

and who has no control over them, who would not have the right to enter therein even to make repairs without his tenant's consent, is not liable for accidents occasioned by the fact that the property is temporarily out of repair."[45] If the lessor has no notice of the defective or dangerous conditions existing upon his premises, and is not chargeable with negligence in failing to discover them at the time of leasing, he is not liable for injuries to the tenant or to strangers; for it is well settled that he is not an insurer and unless he has real or legal notice of the danger, he cannot be said to fail in the discharge of any duty.[46] Finally, if it appears that the injury was the result of the act of the tenant or of a stranger, the landlord is held exempt from responsibility; for the tenant is not his agent, nor can the lessor be deemed to authorize or anticipate the independent acts of third parties.[47]

HENRY M. DOWLING.

Indianapolis, Ind.

[45] Shindlebeck v. Moon, 32 Ohio St. 264.

[46] Schmalzried v. White, 97 Tenn. 36, 36 S. W. Rep 393, 32 L. R. A. 782, (Tenn.); Idell v. Mitchell, 158 N. Y. 134, 52 N. E. Rep. 740; State v. Boyce, 73 Md. 469, 21 Atl. Rep. 327; Aherne v. Steele, 115 N. Y. 203, 5 L R. A. 449.

[47] Texas Loan Agency v. Fleming, 44 L. R. A. 279, (Tex.), 92 Tex. 458, 49 S. W. Rep. 1039; White v. Montgomery, 58 Ga. 204, damage from water closet; Kalis v. Shattuck, 69 Cal. 593, 11 Pac. Rep. 346; Handyside v. Powers, 145 Mass. 123, 128, 13 N. E. Rep. 462, injury from elevator shaft; Mellen v. Morrill, 126 Mass. 545, unguarded excavation; Allen v. Smith, 76 Me. 335, overflowing waterworks; McCarthy v. York Bank, 74 Me. 315, overflowing waterworks; Stewart v. Putman, 127 Mass. 402, coal hole; Adams v. Fletcher, 17 R. I. 137, 20 Atl. Rep. 263, coal hole; Edwards v. N. Y. R. R. Co., 98 N. Y. 256, strangers breaking down gallery by stamping.

CONSTITUTIONAL LAW—RIGHT OF STATE TO INVALIDATE SALE OF STOCKS ON MARGIN.

OTIS & GASSMAN v. PARKER.

Supreme Court of the United States, January 5, 1903.

1. No unconstitutional interference with the right of contract is made by Cal. Const. art. 4, § 26, avoiding all contracts for sales of shares of corporate stock on margin, and providing for the recovery of any money paid on such contracts, although this provision may be construed to apply to *bona fide* as well as gambling contracts.

2. The equal protection of the laws is not denied by Cal. Const. art. 4, § 26, avoiding all contracts for the sale of shares of corporate stock on margin, because this provision strikes only at some, and not all, objects of possible speculation.

HOLMES, J.: This is an action in three counts, for money had and received, for money paid and promised to be repaid, and for margins paid to the defendants as stock brokers on contracts to buy and sell mining stocks, respectively. The answers to the first two counts are general denials and other matters now immaterial. The answer to the third count, beside a general denial, sets up that the count is based upon a provision in article 4, § 26, of the constitution of California, and that that provision is contrary to the 1st section of the 14th amendment of the constitution of the United States. It appears by the record that the only cause of action was that stated specifically in the third count, and that the defendants interposed the constitutional objection at the trial, and that it was overruled. The plaintiff had a general verdict on all three counts. The case was taken from the superior to the Supreme Court of California on appeal, and the judgment of the superior court was affirmed, with an immaterial modification. It now is brought here by a writ of error to the supreme court of the state.

We must take it as established that the plaintiff did enter into transactions prohibited by the constitution of California, and that he had a right to his judgment under that constitution if the clause relied upon is not contrary to the constitution of the United States. There is no question that the parties were subject to the provisions of the latter constitution, and no doubt that the question whether it invalidated the state constitution necessarily was passed upon, and was answered in the negative by the state court. 130 Cal. 322, 62 Pac. Rep. 571, 927.

The provision of the state constitution is as follows: "All contracts for the sales of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." There was some suggestion that these words might be narrowed by construction to contracts not contemplating a *bona fide* acquisition of the stock, but intended to cover only a wager or contemplated settlement of differences. Of course, if they were construed in that sense there would be no doubt of their validity. Booth v. Illinois, 184 U. S. 425, 46 L. Ed. 623, 22 Sup. Ct. Rep. 425 But while the Supreme Court of California says in this case that it "will always see that legitimate business transactions are not brought under the ban," in the same sentence it leaves open the hypothesis that the provision "fails to distinguish between *bona fide* contracts and gambling contracts," and sustains it as a proper police regulation, even if it does fail as supposed. Therefore it may be held hereafter that ordinary contracts for the sale of stocks on margin are not legitimate transactions, and it would not be safe for us to take the words in any other than their literal meaning, or to assume in advance of a decision that they will be taken in a narrow sense. In this case the jury were instructed broadly to find for the plaintiff if he had paid any money to the

defendants as a margin for the purchase of stock of a corporation, and this instruction was sustained.

The objection urged against the provision in its literal sense is that this prohibition of all sales on margin bears no reasonable relation to the evil sought to be cured, and therefore falls within the 1st section of the 14th amendment. It is said that it unduly limits the liberty of adult persons in making contracts which concern only themselves, and cuts down the value of a class of property that often must be disposed of under contracts of the prohibited kind if it is to be disposed of to advantage, thus depriving persons of liberty and property without due process of law, and that it unjustifiably discriminates against property of that class, while other familiar objects of speculation, such as cotton or grain, are not touched, thus depriving persons of the equal protection of the laws.

It is true, no doubt, that neither a state legislature nor a state constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health, or morals, is not conclusive upon the courts. Mugler v. Kansas, 123 U. S. 623, 661, 31 L. Ed. 205, 210, 8 Sup. Ct. Rep. 273; Lawton v. Steele, 152 U. S. 133, 137, 38 L. Ed. 385, 388, 14 Sup. Ct. Rep. 499. But general propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*.

Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere unless, in looking at the substance of the matter, they can see that it "is a clear, unmistakable infringement of rights secured by the fundamental law." Booth v. Illinois, 184 U. S. 425, 429, 46 L. Ed. 623, 626, 22 Sup. Ct. Rep. 425, 427. No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good. The Sunday laws, no doubt, would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy. Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the 14th amendment became law, as indeed they were in some civilized states. See Ballock v. State, 73 Md. 1, 8 L. R. A. 671, 20 Atl. Rep. 184.

We cannot say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion. Of course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price he gets the purchased article, whatever its worth may turn out to be. But if he buys stocks on margin he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay, except that he has had the chances of a bet. There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has. It is said that in California, when the constitution was adopted, the whole people were buying mining stocks in this way with the result of infinite disaster. Cashman v. Root, 89 Cal. 373, 382, 383, 12 L. R. A. 511, 26 Pac. Rep. 883. If at that time the provision of the constitution, instead of being put there, had been embodied in a temporary act, probably no one would have questioned it, and it would be hard to take a distinction solely on the ground of its more permanent form. Inserting the provision in the constitution showed, as we have said, the conviction of the people at large that prohibition was a proper means of stopping the evil. And as was said with regard to a prohibition of option contracts in Booth v. Illinois, 184 U. S. 425, 431, 46 L. Ed. 623, 627, 22 Sup. Ct. Rep. 425, we are unwilling to declare the judgment to have been wholly without foundation.

With regard to the objection that this provision strikes at only some, not all, of the objects of possible speculation, it is enough to say that probably in California the evil sought to be stopped was confined in the main to stocks in corporations. California is a mining state, and mines offer the most striking temptations to people in a hurry to get rich. Mines generally are represented by stocks. Stock is convenient for purposes of speculation, because of the ease with

which it is transferred from hand to hand, as well as for other reasons. If stopping the purchase and sale of stocks on margin would stop the gambling which it was desired to prevent, it was proper for the people of California to go no farther in what they forbade. The circumstances disclose a reasonable ground for the classification, and thus distinguish the case from Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. Rep. 431. We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or the denial of the equal protection of the laws.

Judgment affirmed.

Mr. Justice Brewer and Mr. Justice Peckham dissented.

NOTE.—*Validity and Application of Statutes Prohibiting all "Futures" or Dealing on "Margins."*—Many states, in attempting to eradicate the evils of gambling, have gone to the extreme of denying validity to all forms of future contracts or dealings on margin. To show how far these statutes have gone it is only necessary to call attention to the fact that in England and in the majority of states future contracts and sales on margin are perfectly valid. The rule is well stated in Dillaway v. Alden, 88 Me. 230. Where the court said: "Speculation is not necessarily gambling. So long as there is a real transaction—so long as something is actually bought or sold, or is actually contracted for, either for purchase or sale, there is no wagering, not even if the thing contracted for does not then exist. Nor does a subsequent change in or cancellation of the contract affect its original validity." In many states however, all dealings in futures or on margin are, by statute, constitutional provision or decision of its courts, held to be gambling contracts and therefore void. Cashman v. Root, 89 Cal. 373, 23 Am St. Rep. 482; Moss v. Exchange Bank, 102 Ga. 808; Connor v. Black, 119 Mo. 126; Shea v. Metropolitan Stock Exchange, 168 Mass. 284. Dillard v. Brenner, 73 Miss. 130; Gist v. Telegraph Co., 45 S. Car. 344, 55 Am. St. Rep. 763. In Mississippi, this is no longer the law the statute having been repealed in 1892. This statute was very severe, and, as construed by the Mississippi supreme court, forbade any enforcement in that state of future contracts no matter when and where made. Hence brokers who had made future sales in a jurisdiction where they were lawful could not recover in Mississippi for their commissions and advances. Lemonius v. Mayer, 71 Miss. 514, 15 So. Rep. 66.

The constitutionality of such statutes have not frequently been called in question. In the case of Crandell v. White, 164 Mass. 54, 41 N. E. Rep. 204. The Supreme Court of Massachusetts held that an act allowing one who buys or sells on credit or margin securities or commodities without intending to receive or deliver the same or pay the price, or one who employs another so to buy or sell for him, to recover in an action of contract the money so paid out, is not unconstitutional, as giving principals a remedy against their agents, or as making certain conduct *prima facie* evidence of the existence of a certain fact. The court said: "We discover no ground on which the statute can be held to be unconstitutional. The legislature may well have deemed the transactions referred to in it a species of gambling. And it is too well settled to require discussion that laws aimed at the suppression of gambling are constitutional." The case of Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. Rep. 425, 54 Cent. L. J. 230, upheld the right of the state of Illinois to pass a law prohibiting option contracts. The court said: "A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which ordinarily attend, the pursuit of a particular calling. The state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law." It is very evident from the position of the United States Supreme Court that state legislature will be given a wide latitude in enacting legislation of the character under consideration.

JETSAM AND FLOTSAM.

BEQUEST OF A HUSBAND.

A New York woman is reported as having in her last will and testament bequeathed her husband to another woman. "It will be interesting to note," says *Harper's Weekly*, "the result of this testamentary disposition of a peculiar kind of personal property by one who has been supposed to have only a life interest in the premises." Married women have, by the various state statutes, been vested with large powers in dealing with their separate estates, but as yet the courts have not been called upon to decide whether, under the Married Woman's Act, a husband is a part of a *feme covert's* separate estate, subject to disposition by will or otherwise. If it be admitted that in the hereafter the wife may claim the husband as her own again, the inference would be strong that she has the power of disposition of the interest intervening between her death and the husband's demise on the principle that the common law does not view with favor an estate in abeyance. But this hypothesis cannot be accepted as resting on any sound basis in view of the biblical expressions to the contrary. The question is one of first impression and one which the courts must wrestle with as best they may.—*Law Notes.*

BOOK REVIEWS.

EATON AND GILBERT ON COMMERCIAL PAPER.

The law relating to commercial paper seems to have sufficient number of champions among legal textbook writers. Messrs. James W. Eaton and Frank B. Gilbert have just entered the field of authors on this subject, and by their conjoint endeavor have produced, in one volume, a practical and exhaustive treatise on the law of commercial paper, covering all this important subject in every detail. This work is complete in every respect. It embraces all the law relating to commercial paper, including promissory notes, bills of exchange, checks, municipal bonds and coupons, and all other instruments, negotiable and non-negotiable, commonly classed as commercial paper. It is adapted for use in every state. The text contains the rules of law relating to this subject as declared by the courts of every state. Cases in every jurisdiction, including those decided and reporte d

prior to January 1, 1903, upholding the rules declared in the text are cited, and extracts from the opinions in leading cases, are contained in very complete foot notes. Such rules and doctrines as are declared in the negotiable instruments law are fully treated in their proper connection, and are discussed with a view of noting and commenting upon the relation which they bear to the rules and doctrines as they existed prior to the enactment of that law. We commend this new work to the profession as a valuable addition to the text-books on this subject. Published by Mathew Bender, Albany, N. Y.

TIFFANY ON REAL PROPERTY.

A new and original work dealing with the modern law of real property is a two volume work just prepared by Herbert F. Tiffany. The work is scholarly in execution and presents the subject with clearness and precision. Particular attention might be called to the treatment of Quantum of Estates, in chapter IV. which impresses us as a most lucid exposition of this important and somewhat intricate subject. The clearness of the analysis, reinforced by the black letter text, give a complete grasp of the law. Another element of superiority is the treatment of Mortgages in part VI. The treatment of this subject evidences a comprehensiveness and an exhaustiveness not excelled by any other work. Another very interesting discussion is that entitled Registration of Title, chapter XXXII. In no other work of a general nature is this new idea in legislation so completely discussed. The whole question as to the constitutionality and adaptation of the Torrens system of registration under our form of government is clearly presented, and all cases bearing on the question, cited and reviewed. The author seems to have based some of his statements on an exhaustive review of this subject in the CENTRAL LAW JOURNAL, as he cites 54 Cent. L. J. 293, very prominently. This entire work is designed to cover the common law of real property, as it exists to-day. The ancient rules which underlie the entire subject, and, to some considerable extent, survive, are treated with rare clearness. The citations are copious and from the most modern authorities obtainable. They have been examined by the author personally, and will be found to be in point. Black letter text at the beginning of each chapter states concisely the rules of law established by the authorities and discussion in that chapter. Published in two volumes by Keefe-Davidson Company, St. Paul, Minn.

HUMOR OF THE LAW.

Justice Dickey of the Supreme Court of New York recently refused to approve the articles of incorporation of a social organization on the ground that its name, "The United Bugs Social Club," was objectionable. The judge has evidently decided that in this age of combinations of various kinds the line must be drawn somewhere.

Judge Scarritt, falling into a recital of unexpected answers from witnesses, told the following as happening while he was on the bench. Senator Ballingal, desiring to be particularly severe with a negro witness and thoroughly discredit his testimony began his cross-examination with, "Rastus, do you drink?" "Not to-day, sah, thank you, Mr. Ballingal," came the darkey's unexpected reply.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCOUNT STATED—Conclusiveness.—Settled accounts are conclusive between the parties, unless fraud, mistake, or omission is shown.— Batson v. Findley, W. Va., 43 S. E. Rep. 142.

2. ACKNOWLEDGMENT — Record.— A certificate of acknowledgment of a deed made by the grantee therein is invalid as authority to admit the deed to record, and record thereof is not constructive notice. — Hunton v. Wood, Va., 43 S. E. Rep. 186.

3. ALIENS—Witnesses. — If the defendant, in proceedings for the deportation of a Chinese person, fails to give testimony in his own behalf to explain doubtful matters peculiarly within his own knowledge, such fact may be considered where the testimony is contradictory. — United States v. Lee Huen, U. S. D. C., N. D. N. Y., 118 Fed. Rep. 442.

4. ANIMALS—Separate Counts.— Counts of an information for cruelty to animals, charging the offense to have been committed on January 1st, and on each day from then until March 11th, may have been used to describe one offense.—State v. Cook, Conn., 53 Atl. Rep. 589.

5. APPEAL AND ERROR—Bankruptcy.—A district court of the United States has jurisdiction of an action brought by a trustee in bankruptcy in the name of the United States on the bond of a former trustee to recover the value of property for which he has failed to account.— United States v. Union Surety & Guaranty Co., U. S. D. C., S. D. N. Y , 118 Fed Rep. 482.

6. APPEAL AND ERROR—Construction of Contract.— The fact that a bankrupt represented himself to be merely an agent or factor for the sale of certain goods consigned to him cannot enlarge the rights of the consignor as against his other creditors, nor affect the construction of the contract under which the goods were shipped to him, where it contains no latent ambiguity.— *In re* Rabenau, U. S. D. C., N. D. Mo., 118 Fed. Rep. 471.

7. APPEAL AND ERROR— Failure to Raise Question at Trial. — Where a contention was not made at the trial, it will not be reviewed on appeal. — Cunnongham Lumber Co. v. Mayo, Conn., 53 Atl. Rep. 580.

8. APPEAL AND ERROR—Oral Agreement. — Where the terms of an oral agreement were indefinite, the real con-

tract must be largely inferred from the subsequent course of dealing. — Whale v. Gatch, Oreg., 70 Pac. Rep. 832.

9. APPEAL AND ERROR—Record. — The supreme court will not search the record for errors not pointed out in the brief.—Anderson v. Anderson, Neb., 92 N. W. Rep. 151.

10. APPEAL AND ERROR — Verdict. — The question whether the verdict is contrary to law and the evidence cannot be considered, where the record does not affirmatively show that it contains all the evidence.—City of Greenfield v. Johnson, Ind., 65 N. E. Rep. 542.

11. APPEAL AND ERROR— Writ of Error. — A writ of error to a judgment for errors involving the evidence alone, which is not in any manner made part of the record, will be dismissed.— Richardson v. McConanghey, W. Va., 43 S. E. Rep. 124.

12. ASYLUMS—Public Funds.—Laws 1850, ch. 261, § 1, entitling orphan asylums to participate in the distribution of public school moneys, held not affected by Const. art. 9, § 4, prohibiting the distribution of moneys to sectarian schools. — Sargent v. Board of Education of City of Rochester, 79 N. Y. Supp. 127.

13. ATTORNEY AND CLIENT— Dissolution of Law Firm.— Where a law firm dissolves, assigning undisposed of cases to the several members, services rendered by members to each other in the assigned cases will be held to be gratuitous.—Lamb v. Wilson, Neb., 92 N. W. Rep. 167.

14. ATTORNEY AND CLIENT— Right to Employ Local Counsel. — An attorney, retained to conduct a case pending in another county may employ local counsel to attend to the formal matters, and charge the fees paid as expenses.—Dillon v. Watson, Neb., 92 N. W. Rep. 156.

15. ATTORNEY AND CLIENT — Unconscionable Fee. — Agreement between attorney and client for an attorney's fee of 50 per cent. of the recovery held unconscionable.— *In re* Fitzsimons, 79 N. Y. Supp. 194.

16. BANKRUPTCY — Discharge. — Under Bankr. Act, §§ 14, 29 U. S. Comp. St. 1901, pp. 3427, 3433, the making of a false oath by a bankrupt in a certain other proceeding held not to warrant the court in refusing his discharge.— *In re* Blalock, U. S. D. C., D. S. Car., 118 Fed. Rep. 679.

17. BANKRUPTCY — Enjoining Proceedings in State Court.—A suit to enjoin a suit in a state court by a judgment creditor to have a deed set aside as fraudulent is not within the jurisdiction of a court of bankruptcy.— Pickens v. Roy, U. S. S. C., 23 Sup. Ct. Rep. 78.

18. BANKRUPTCY—Injunction. — Bankr. Act, 1898, § 2 cl. 7, U. S. Comp. St. 1901, p. 3421, held to authorize a court of bankruptcy to enjoin, pending the bankruptcy proceedings, a sale by a mortgagee under mortgages executed more than four months before the mortgagor's bankruptcy.—*In re* Ball, U. S. D. C., D. Vt., 118 Fed. Rep. 672.

19. BANKRUPTCY—Intent as Affecting Preference.—Under Bankr. Act, § 60, 30 Stat. 562 U. S. Comp. St. 1901, p. 3445, an intent on the part of an insolvent to give a preference held necessary in order to create one.— Benedict v. Deshel, 79 N. Y. Supp. 205.

20. BANKRUPTCY — Interference with State Court. — A court of bankruptcy is without jurisdiction to enjoin further proceedings in a state court in a judgment creditor's action commenced before passage of the bankruptcy act.—Metcalf v. Barker, U. S. S. C., 23 Sup. Ct. Rep. 67.

21. BANKRUPTCY—Limitations. — The scheduling by a bankrupt of a debt which is absolutely barred by limitation under the statute of the state does not make it a provable claim and it is the duty of the trustee to plead the statute on behalf of other creditors.— *In re* Wooten U. S. D. C., 118 Fed. Rep. 670.

22. BANKRUPTCY—Partnership Creditors.—Partnership creditors are entitled to share ratably with individual creditors in the individual assets of a bankrupt, where the partnership became insolvent and its assets were exhausted prior to the bankruptcy and before the individual debts were contracted.— *In re* Conrader, U. S. D. C., 118 Fed. Rep. 676

23. BANKRUPTCY—Preference.— Under Bankr. Act 1898, § 3, subd. 2; and sections 60a, 67e U. S. Comp. St. 1901, pp. 3422, 3445, 3449, relating to preferences and void conveyances and incumbrances, a mortgage, given by an insolvent firm within four months of bankruptcy proceedings against it to secure a past indebtedness, held void. — *In re* Jones, U. S. D. C., D. S. Car., 118 Fed. Rep. 673.

24. BANKRUPTCY— Preferences. — A trustee in bankruptcy may recover a preferential transfer made by the bankrupt within four months of filing his petition in bankruptcy.—Johnson v. Cohn, 79 N. Y. Supp. 189.

25. BANKRUPTCY—Trover Against Trustee.—An action of trover against a trustee in bankruptcy may be maintained in a state court.—Weeks v. Fowler, N. H., 53 Atl. Rep. 543.

26. BANKRUPTCY— Unrecorded Conditional Sale.—Under the federal bankruptcy law an unrecorded conditional sale is void, under Comp. St. ch. 32, § 26, against the trustee in bankruptcy.— Logan v. Nebraska Moline Plow Co., Neb., 92 N. W. Rep. 129.

27. BANKS AND BANKING — Refusal to Pay Check. — A petition which states that a bank in which plaintiff had money on deposit refused to honor his check on demand states a cause of action. — Kleopfer v. First Nat. Bank, Kan., 70 Pac. Rep. 880.

28. BENEFIT SOCIETIES—Burden of Proof. — The burden of proving that representations made by insured in his application were fraudulent and made in bad faith is on the company.—Alden v. Supreme Tent of Knights of Maccabees of the World, 79 N. Y. Supp. 89.

29. BILLS AND NOTES — Check. — In order to hold the drawer liable on his check, it must be presented not later than the day following when received in the place in which the bank is located. — Edmisten v. Herpolscheimer, Neb., 92 N. W. Rep. 138.

30. BILLS AND NOTES—Laches.— Indorser of note held to have lost by his laches the right to avoid the indorsement because of fraud.— Dunn v. Columbia Nat. Bank, Pa., 53 Atl. Rep. 519.

31. BILLS AND NOTES—Mortgage. — Where a note and the mortgage securing it are made contemporaneously, all persons chargeable with notice of the conditions of the mortgage are bound by its terms affecting the negotiability of the note.— Kendall v. Selby, Neb., 92 N. W. Rep. 178.

32. BOUNDARIES — Field Notes.— In the absence of a government corner, or of satisfactory proof of its location, the field notes are *prima facie* evidence of the true location of the true line of the survey.—Knoll v. Randolph, Neb., 92 N. W. Rep. 195.

33. BUILDING AND LOAN ASSOCIATIONS — Estoppel.— Where holder of certificate in building associations has fully complied with its terms, the association held es topped to deny its authority to enter into the contract shown by the certificate.— Vought v. Eastern Building & Loan Assn., N. Y., 65 N. E. Rep. 496.

34. BUILDING AND LOAN ASSOCIATIONS — Insolvency.— Where a building association became insolvent, an equitable adjustment of the amount due by a borrowing member should be had as of the date receivers were first appointed.—Riggs v. Carter, 79 N. Y. Supp. 177.

35. CARRIERS—Discrimination in Rates.— The fact that a railroad line, operated as a part of a large railway system, considered as a separate road, fails to pay expenses, does not justify the charging of unjust and unreasonable rates, nor undue discrimination in rates.— Interstate Commerce Commission v. Louisville & N. R. Co., U. S. C. C., S. D. Ga., 118 Fed. Rep. 613.

36. CARRIERS—Limiting Liability.— It is competent for a railroad company to contract with the shipper, limiting its liability to the transportation of the property over its own line.—Fremont, E. & M. V. R. Co. v. New York, C. & St. L. R. Co., Neb., 92 N. W. Rep. 131.

37. CARRIERS — Personal Injury. — Carrier's duty to maintain safe alighting places held not discharged by

providing a safe platform against a person injured by want of sufficient light thereon.—Duell v. Chicago, N. W. Ry. Co., Wis., 92 N. W. Rep. 269.

38. CARRIERS — Round Trip Tickets.—Where a round trip railroad ticket is sold, good only for one day, it is good for a return trip on the only train returning that day.—Illinois Cent. R. Co. v. Harris, Miss., 32 So. Rep. 309.

39. CARRIERS — Transporting Live Stock. — Where a shipper agrees to personally accompany live stock, and is given free transportation and proper facilities, he cannot complain of injury arising from lack of watering through his own fault.—Chicago, St. P., M. & O. R. Co. v. Schuldt, Neb., 92 N. W. Rep. 162.

40. CENSUS — False Returns.—A census enumerator, in making a supplemental return, after his schedules had been sent in and had been returned to him to supply claimed omissions, acted in his official capacity, and subject to the penalties of the act for making a false return.—Ching v. United States, U. S. C. C. of App., Fourth Circuit, 118 Fed. Rep. 538.

41. CERTIORARI — Improper Writ of Error.—*Certiorari* to the circuit court of appeals may be allowed by the supreme court, where the cause has been improperly brought up by a writ of error. — Security Trust Co. v. Dent, U. S. S. C. 23 Sup. Ct. Rep. 61.

42. CHATTEL MORTGAGES—Lien.—An immaterial variance between a copy of a chattel mortgage as filed, and the original, will not destroy the mortgage lien.—Central Nat. Bank v. Brecheisen, Kan., 70 Pac. Rep. 895.

43. CHATTEL MORTGAGES — Unrecorded. — Under the statute of California, a chattel mortgage is void as to property situated in a county where it is not recorded, as against the trustee in bankruptcy of the mortgagor.—Guras v. Porter, U. S. D. C., N. D. Cal., 118 Fed. Rep. 668.

44. COMMERCE — Exclusive Franchise. — Telephone companies are important agencies in the transaction of interstate commerce, and neither a state nor an Indian nation has power to grant an exclusive franchise to maintain telephone lines within its territory.—Muskogee Nat. Tel. Co. v. Hall, U. S. C. C. of App., Eighth Circuit, 118 Fed. Rep. 382.

45. COMMERCE—Telegrams.—Copies of telegrams sent by interstate commerce commission need not be filed as telegraph vouchers for which credit is asked, where of a confidential nature. — United States v. Moseley, U. S. S. C., 23 Sup. Ct. Rep. 90.

46. CONSTITUTIONAL LAW — Amendment of Corporate Charter.—A statute fixing the rate of taxation on gross receipts of railroad company, pending controversy as to charter right of exemption from taxation, held subject to repeal, under provision of state constitution reserving power to repeal or amend corporate charters.—Northern Cent. Ry. Co. v. State of Maryland, U. S. S. C., 23 Sup. Ct. Rep. 62.

47. CONSTITUTIONAL LAW—Assignment of Wages.—Acts 1899, p. 193, § 4, prohibiting the assignment of future wages, is a lawful exercise of the state's police power, and not in violation of Const, art. 1, § 1, in regard to undue restraints, or Const. U. S. 14th amend. § 1. — International Text-Book Co. v. Weissinger, Ind., 65 N. E. Rep. 521.

48. CONSTITUTIONAL LAW — Due Process. — Comp. St. 1901, § 4920, providing that unclaimed witness fees and other costs shall be paid into the common school fund of of the county, held not unconstitutional as devesting the witnesses of their money without due process of law.—Douglas County v. Moores, Neb., 92 N. W. Rep. 199.

49. CONSTITUTIONAL LAW — Easements. — A license to use the land of another as a private way, without assertion of right held revocable at the will of the owner, and constituted no basis for a prescriptive easement.—Kibbey v. Richards, Ind., 65 N. E. Rep. 541.

50. CONSTITUTIONAL LAW — Highway Crossings.—The highway statute held not unconstitutional for failure to provide for the giving of actual notice of the proceedings to establish a highway to all persons affected.—Baltimore & O. S. W. R. Co. v. State, Ind., 65 N. E. Rep. 508.

51. CONSTITUTIONAL LAW—Master and Servant.—Acts 1901, p. 548 (Burns' Rev. St. 1901, § 7448a), relating to the liabilities of merchants taking assignments of miners' wages for other than cash, held violative of Const. art. 1, § 23 prohibiting class legislation.—Dixon v. Poe, Ind., 65 N. E. Rep. 518.

52. CONSTITUTIONAL LAW — Suicide as Affecting Life Policies.—Subsequent re-enactment of Rev. St. Mo. 1879, § 5982, providing that suicide shall be no defense to a policy of insurance after its repeal, held not an impairment of the obligations of contracts.—Knights Templars' & Masons' Life Indemnity Co. v. Jarman, U. S. S. C., 23 Sup. Ct. Rep. 108.

53. CONSTITUTIONAL LAW—Trust Funds.—Const. § 212, held not self-executing, so as to require the state auditor to pay interest on the trust funds belonging to the Industrial Institute and college for girls, without an appropriation therefor.—State v. Cole, Miss., 32 So. Rep. 314.

54. CONTINUANCE—Absent Witness.—Absence of a witness, whose evidence is purely cumulative, is no ground for a continuance.—Scott v. Boyd, Va., 42 S. E. Rep. 918.,

55. CONTRACTS — Extra Work. — A contractor having followed the specifications without the desired result, on being ordered to reconstruct, held entitled to recover therefor.—Dwyer v. City of New York, 79 N. Y. Supp. 17.

56. CONTRACTS — Lack of Mutuality.—A contract is not void for lack of mutuality where the party who is not bound has performed all the conditions of the contract.—Friend v. Mallory, W. Va., 43 S. E. Rep. 114.

57. CONTRACTS — Negligence in Signing.—The doctrine that a person is not inexcusably negligent in signing a contract, relying on a false statement on the part of the other party as to its import, applies only where the deceit is practiced at the time of such signing.—Bostwick v. Mutual Life Ins. Co., Wis., 92 N. W. Rep. 246.

58. CONVICTS — Surrender of Prisoner.—A marshal has no authority to surrender a prisoner in his custody, to be delivered to a penitentiary in execution of a sentence of imprisonment, to the marshal of another district, to be tried for a different offense.—*In re* Jennings, U. S. C. C., E. D. Mo., 118 Fed. Rep. 479.

59. CORPORATIONS — Due Process of Law.—To constitute a violation of the constitutional inhibition upon the states to deprive a person of property without due process of law by acts of their officers or agents, such acts must be within the power or discretion vested in them by some law of the state. — Huntington v. City of New York, U. S. C. C., S. D. N. Y., 118 Fed. Rep. 683.

60. CORPORATIONS — Estoppel. — A corporation is estopped from denying in any particular instance that its president had the power which it customarily allowed him to exercise. — St. Clair v. Rutledge, Wis., 92 N. W. Rep. 284.

61. CORPORATIONS—Insolvency.—The remedy against a stockholder of an insolvent corporation, given the receiver by Laws Kan. 1899, ch. 10, cannot be enforced until after suit against the corporation and resident stockholders.—Evans v. Nellis, U. S. S. C., 23 Sup. Ct. Rep. 74.

62. CORPORATIONS—Notice to President.—Notice to the president of a bank of a pledge of certain of its stock held to bind the bank and render its statutory lien for a loan subsequently made to the stockholder secondary to, that of the pledgee.—Curtice v. Crawford County Bank. U. S. C. C. of App., Eighth Circuit, 118 Fed Rep. 390.

63. CORPORATIONS—Stockholder's Liability.—That a receiver of an insolvent corporation has no power to enforce stockholders' statutory liability does not preclude a stockholder from discharging such liability by a payment to the receiver. — Strauss v. Denny, Md., 53 Atl. Rep. 571.

64. CORPORATIONS — Want of Corporate Officials.—Want of corporate officers held not to incapacitate a corporation from possessing personal property, in view of agreed facts in replevin action.—Grand Rapids Furniture Co. v. Grand Hotel & Opera House Co., Wyo., 70 Pac. Rep. 888.

65. COSTS — Jurisdiction. — Where plaintiff, against whom judgment has been rendered, claims that the court has no jurisdiction, and the decree is reversed, costs will be awarded against him.—Freer v. Davis, W. Va., 43 S. E. Rep. 164.

66. COURTS—Construction of Statute.—The construction of a statute by the highest judicial tribunal of a state is conclusive on the courts of other states.—Schmaltz v. York Mfg. Co., Pa., 53 Atl. Rep. 522.

67. COURTS—Insurance.—Decision of Missouri supreme court that repeal of Rev. St. Mo. 1879, § 5982, declaring suicide shall be no defense to a life insurance policy was effective as to all policies issued on the assessment plan, held binding on the Supreme Court of the United States.—Knights Templars' & Masons' Life Indemnity Co. v. Jarman, U. S. S. C. 23 Sup. Ct. Rep. 108.

68. COURTS — Limitations.—A non-resident owner of a claim against a decedent cannot sue the administrator in a federal court, where the suit in a state court would be barred because of expiration of period limited by the probate court. — Security Trust Co. v. Black River Nat. Bank, U. S. S. C., 23 Sup. Ct. Rep. 52.

69. COVENANTS—General Warranty.—Where there is a conveyance with a general warranty, and the land is sold under a prior deed of trust, and the covenantee quits possession, such sale is a breach of the warranty.—Harr v. Shaffer, W. Va., 43 S. E. Rep. 89.

70. COVENANTS — Petition. — A petition for an alleged breach of a covenants of general warranty must allege on eviction, a surrender, or attornment by reason of a paramount title. — Sears v. Broady, Neb., 92 N. W. Rep. 214.

71. CREDITOR'S SUIT—Garnishment.—It is error to dismiss a creditors' bill, on finding that defendants were indebted to the judgment debtor for rent, because plaintiff had an adequate remedy by garnishment.—Benedict v. T. L. V. Land & Cattle Co., Neb., 92 N. W. Rep. 210.

72. CRIMINAL EVIDENCE—Res Gestæ.—The statement of a person, a few moments after he had received a fatal shot, that defendant fired such shot, is admissible as part of the *res gestæ*.—State v. Wilmbusse, Idaho, 70 Pac. Rep. 849.

73. CRIMINAL EVIDENCE—Waiver of Objection.—Admission of incompetent evidence over objection and exception is not cured by the fact that afterwards evidence was given along the same lines without objection being made.—Cook v. State, Miss., 32 So. Rep. 312.

74. CRIMINAL LAW—Constitutional Law—Double Punishment.—Cr. Code, § 124, held not unconstitutional as inflicting a double punishment on defendant or awarding the injured party double damages.—Everson v. State, Neb., 92 N. W. Rep. 187.

75. CRIMINAL LAW—Evidence.—A magazine held admissible, without proof of its genuineness, for comparison with a mutilated magazine and pieces of paper used as a wad in the gun with which deceased was shot.—State v. Dixon, N. Car., 42 S. E. Rep. 944.

76. CRIMINAL LAW—Larceny.—A statement of a codefendant in a prosecution for larceny to a police officer held admissible, under an instruction that it should not be considered against the other defendants.—Collins v. State, Wis., 93 N. W. Rep. 266.

77. CRIMINAL LAW—Middle of River.—Courts take judicial cognizance that offenses between the middle line of the Mississippi river and the Mississippi shore are within the jurisdiction of the courts of the districts on the margin east of the place of the offense.—Cook v. State, Miss., 32 So. Rep. 312.

78. CUSTOMS AND USAGES—Notice. — To render evidence of a custom peculiar to a particular business limiting the authority of agents employed therein admissible against a third party not engaged in such business knowledge of such custom must be brought home to him.—Great Western Elevator Co. v. White, U. S. C. C. of App., Eighth Circuit, 118 Fed. Rep. 406.

79. DAMAGES—Lateral Support.—Measure of damages to adjoining building for improper excavation held to be the actual damage, with compensation for delay in its payment.—Irvine v. Smith, Pa., 53 Atl. Rep. 510.

80. DAMAGES—Personal Injuries.—In an action for personal injuries alleged to have caused an abortion, an instruction allowing recovery for shame and degradation held erroneous.—Loomis v. Hollister, Conn., 53 Atl. Rep. 579.

81. DEEDS—Fraud.—Unless grantee in a deed make statements inducing mistake on the part of the grantor, or with knowledge of such mistake keeps silent, he is not guilty of fraud, authorizing cancellation.—Stewart v. Dunn, 79 N. Y. Supp. 123.

82. DISMISSAL AND NONSUIT—Right of Plaintiff Before Trial.—Under the rule of the common law, where no affirmative relief is asked for by the defendant, a plaintiff may discontinue his action without prejudice at any time before trial as a matter of right.—United States v Norfolk & W. Ry. Co., U. S. C. C. of App., Fourth Circuit, 118 Fed. Rep. 554.

83. DIVORCE—Rough Language.—While the habitual use of rough language may be a cause for divorce, much must depend on the character of the parties and the extent of their cultivation.—Shuster v. Shuster, Neb., 92 N. W. Rep. 203.

84. DRUGGISTS—License.—In a prosecution for carrying on business as a druggist without a license, the burden of justifying under license is on the defendant.—State v. Horner, W. Va., 43 S. E. Rep. 89.

85. DRUGGISTS—Right of Way.—The use of a way by a claimant in common with the public is regarded as being exercised under an implied license, and is not adverse unless there is some act on his part indicating an independent claim of right.—Reed v. Garnett, Va., 43 S. E. Rep. 182.

86. ELECTRICITY — Attractive Nuisance. — An electric company held liable for injuries resulting from its wires, laid close to a railing over which small boys were in the habit of climbing and getting close to the wires.—Consolidated Electric Light & Power Co. v. Healy, Kan., 70 Pac. Rep. 884.

87. EMINENT DOMAIN—Elevated Road.—Lessor, by consenting to construction of elevated road, cannot deprive lessee of right to recover resulting damages.—Storms v. Manhattan Ry. Co., 79 N. Y. Supp. 60.

88. EMINENT DOMAIN—Street Railway. — Act May 14, 1899 (P. L. 211), § 14, as amended by Act June 7, 1901 (P. L. 514), authorizing a street railway company to use the track of another company for certain prescribed distances, is unconstitutional.—Commonwealth v. Uwchlan St. Ry. Co., Pa., 53 Atl. Rep. 513.

89. EQUITY—Waste.—A court of equity has jurisdiction of a suit to restrain waste by the cutting of timber which constitutes the chief value of the land, for an accounting for past waste and to quiet title to the land, although complainant is not in possession.—Douglas Co. v. Tennessee Lumber Mfg. Co., U. S. C. C. of App., Sixth Circuit, 118 Fed. Rep. 438.

90. EVIDENCE—Admissibility. — Where two receivers, jointly appointed, employed plaintiff as general manager, statements and conversations with either is admissible, though not in the presence of the other.—Shirk v. Brookfield, 79 N. Y. Supp. 225.

91. EVIDENCE—Agents.—Declaration of an agent, not made in connection with the performance of his duties as agent, held inadmissible as against the principal.—Leary v. Albany Brewing Co., 79 N. Y. Supp. 130.

92. EVIDENCE—Credibility of Witness.—The credibility of a witness may be affected by circumstances or by his own testimony as well as by contradictory evidence.—United States v. Lee Huen, U. S. D. C., N. D. New York, 118 Fed. Rep. 432.

93. EVIDENCE—Expert Witness.—An expert witness cannot base his opinion as to mental capacity of a testator on his knowledge of undisclosed facts as to his condition.—Raub v. Carpenter, U. S. S. C. 23 Sup. Ct. Rep. 72.

94. EVIDENCE—Presumption.—Where the burden is on a party to prove a material fact, his failure to produce an important witness to the fact raises the conclusive presumption that such witness would not prove it.—Vandervort v. Fouse, W. Va., 43 S. E. Rep. 112.

95. EVIDENCE—Unverified Copies.—Unverified copies of reports held inadmissible, where the originals could have been secured by subpœna.—Crane v. Bennett, 79 N. Y. Supp. 66.

96. EXCEPTIONS, BILL OF—Record.—The words "here insert" held not to make a motion part of a bill of exceptions, though the motion appears elsewhere in the transcript.—Midland Ry. Co. v. Trissal, Ind., 65 N. E. Rep. 543.

97. EXECUTORS AND ADMINISTRATORS—Insolvent Estate.—A creditor of an insolvent estate, who is also its debtor, may have his claim set off against the claim of the estate against him, if it accrued in the lifetime of the deceased.—Helms v. Harclerode, Kan., 70 Pac. Rep. 966.

98. EXECUTORS AND ADMINISTRATORS—Negligence.—Executors held chargeable for moneys which they failed to collect, though able so to do, and for money collected which they failed to charge themselves with. — *In re* Irvine's Estate, Pa., 53 Atl. Rep. 502.

99. EXEMPTIONS — Action on Judgment. — A set-off against a judgment for the value of exempt persona property seized on execution, where such judgment is in the hands of the original judgment creditor, will not be permitted.—Treat v. Wilson, Kan., 70 Pac. Rep. 893.

100. EXTRADITION—Warrant of Arrest.—Production of certified copy of an order of a Russian examining magistrate, evidently designed to secure the apprehension of the accused, held to satisify the requirement of the extradition treaty with Russia of June 5, 1893.—Grin vl Shine, U. S. S. C., 23 Sup. Ct. Rep. 98.

101. FERRIES—Loss of Patronage. — The owner of a ferry cannot recover compensation from loss of patronage incident to the establishment of a second ferry.—Sistersville Ferry Co. v. Russell, W. Va., 43 S. E. Rep. 107.

102. FRAUDS, STATUTE OF—Sufficiency of Recital.—In construing a contract of guaranty, in order to determine whether the consideration for it is inferable from its wording as required by the statute of frands, all the facts connected with its delivery may be shown by oral proof.—Union Nat. Bank v. Leary, 79 N. Y. Supp. 217.

103. FRAUDULENT CONVEYANCES—Husband and Wife.—A deed between husband and wife held valid as between them, though made to avoid the husband's obligation as an official bondsman.—Wyatt v. Wyatt, Miss., 32 So. Rep. 317.

104. FRAUDULENT CONVEYANCES—Rights of Creditors.—Where a father puts valuable improvements on the property of his daughter, their value may be charged upon the land by his then existing creditor.—Vandervort v. Fouse, W. Va., 43 S. E. Rep. 112.

105. GARNISHMENT—Attachment.—A writ of foreign attachment, having been duly executed, does not become void by failure of the sheriff to return it upon the return day.—Guarantee Trust & Safe Deposit Co. v. Nebeker, N. J., 53 Atl. Rep. 558.

106. GARNISHMENT—Municipality.—Money payable by a city to contractors, during the contract for the construction of a public work, held not subject to garnishment.—Pringle v. Guild, U. S. C. C., D. S. Car., 118 Fed. Rep. 655.

107. GIFTS—Conditions.—In an action to recover a gift *inter vivos*, an instruction that, if the gift was conditional, plaintiff could not recover, held improperly refused.—Tyrrel v. Emigrant Industrial Sav. Bank, 79 N. Y. Supp. 49.

108. HABEAS CORPUS—In Federal Courts. — *Habeas corpus* will not be granted a person sentenced for violation of a state law, on the ground that he is held in violation of the federal constitution, where no appeal has been taken.—Reid v. Jones, U. S. S. C., 23 Sup. Ct. Rep. 89.

109. HIGHWAYS — Remedies of Taxpayers. — A resident taxpayer has such an interest in funds for the construction of a road, to which funds his assessment had contributed, as to give him a right to prevent their wrongful application.—Miller v. Bowers, Ind., 65 N. E. Rep. 559.

110. HOMICIDE — Dying Declaration.—A dying declaration, though not all written in the presence of the person making it, may be competent, where the entire declaration was read to such person and he fully understood it and signed it. — State v. Wilmbusse, Idaho, 70 Pac. Rep. 849.

111. HOMICIDE — Intoxication. — A person guilty of homicide may reduce his crime to murder in the second degree by showing that he was so intoxicated that he was incapable of doing a deliberate act.—State v. Davis, W. Va., 43 S. E. Rep. 99.

112. HUSBAND AND WIFE — Conveyance to Wife. — A wife in a suit by creditors to charge land with her husband's debts must prove that she paid for it with her separate estate.—Harr v. Shaffer, W. Va., 43 S. E. Rep. 89.

113. INDIANS — Right to Land. — The legislature may authorize Indians to acquire rights in state lands, and authorize them to bring action in the courts to enforce their rights.—Jimson v. Pierce, 79 N. Y. Supp. 3.

114. INTEREST — Unreasonable Retention of Amount Due. — Neither excessive demand, nor fact that account was in dispute, held to relieve debtor from liability for interest on unreasonably detaining amount due.—Loomis v. Gillett, Conn., 53 Atl. Rep. 581.

115. JUDGMENT — Exemptions. — An action can be brought on a domestic judgment to recover a second judgment thereon, if begun before the first judgment becomes dormant. — Treat v. Wilson, Kan., 70 Pac. Rep. 893.

116. JUDGMENT — Joint Obligors. — A judgment against two joint obligors served with process is no bar to a subsequent judgment against a third obligor in the same suit who was not served when the first judgment was rendered. — Armentrout v. Smith, W. Va., 43 S. E. Rep. 98.

117. JUDGMENT — Res Judicata.—A plea of *res judicata*, showing the pleadings, findings of fact, conclusions of law, and judgment in the former action, requires no further allegations to show the issues and their determination.—Dixon v. Caster, Kan., 70 Pac. Rep. 871.

118. JUDICIAL SALES — Terms. — Where the report of a referee directing the sale of certain real estate, following the terms of a will, was silent as to the methods or terms of a sale, it will be presumed that only a cash sale was ordered.—Shrady v. Van Kirk, 79 N. Y. Supp. 79.

119. JURY—Purging Jury List.—Merely purging the jury list of the names of those who have not paid their taxes, without adding new names, held, under Code, §§ 1722, 1728, not to vitiate the venire. — State v. Dixon, N. Car., 42 S. E. Rep. 944.

120. LANDLORD AND TENANT—Agreement to Lease.—In an action for breach of an agreement of letting, where plaintiff held under a written lease, recovery can be had only for breaches of the covenants of the lease.—Drischman v. McManemin, N. J., 53 Atl. Rep. 548.

121. LANDLORD AND TENANT—Estoppel to Deny Title.—One who enters upon land in accordance with an understanding with a tenant, who vacates when he enters, is himself estopped as a tenant from denying the title of the original tenant's landlord. — Stewart v. Keener, N. Car., 42 S. E. Rep. 935.

122. LANDLORD AND TENANT — Termination of Lease.—Under a lease for one month and from month to month thereafter until terminated at the option of either party or by the failure of the lessee to pay the rent, an action of detainer lies where the lessee has refused to pay rent or to surrender the premises after written demand therefor. — Ellis v. Fitzpatrick, U. S. C. C. of App., Eighth Circuit, 118 Fed. Rep. 480.

128. LIFE INSURANCE — Suicide. — There can be no recovery upon a life insurance policy containing a provision that "self-destruction, sane or insane," is a risk not assumed, where the insured took his own life other than accidentally, whatever may have been his mental condi-

tion. — Clark v. Equitable Life Assur. Soc., U. S. C. C. of App., Fourth Circuit, 118 Fed. Rep. 374.

124. LIFE INSURANCE—Suicide.—Only policies of insurance issued on the assessment plan after insurance company obtained its certificate are relieved from provisions of Rev. St. Mo. 1879, § 5982, declaring that suicide shall be no defense to a suit on the policy.—Knights Templars' & Masons' Life Indemnity Co. v. Jarman, U. S. S. C., 23 Sup. Ct. Rep. 108.

125. LOGS AND LOGGING—Contract of Sale.—A contract for the sale of all the timber on certain land, the purchaser to have two years to remove it, does not authorize severing any timber standing on the land after the two years has expired. — Null v. Elliott, W. Va., 42 S. E. Rep. 173.

126. MANDAMUS — County Canvassing Board.—*Mandamus* will not lie to require a county canvassing board to recanvass returns and exclude certain votes, because returned under a law that is claimed to be unconstitutional.—Sharpless v. Buckles, Kan., 70 Pac. Rep. 886.

127. MANDAMUS — Ineffectiveness of Writ.—A proceeding for a *mandamus* should be dismissed, where it is made to appear by the relator, before trial, that the time has passed when the writ could have any practical effect, if issued.—United States v. Norfolk & W. Ry. Co., U. S. C. C. of App., Fourth Circuit, 118 Fed. Rep. 554.

128. MANDAMUS—Necessary Parties.—Where notes are given to one person and a mortgage to secure them to another, the mortgagee is a necessary party to an action to foreclose.—Swenney v. Hill, Kan., 70 Pac. Rep. 868.

129. MARINE INSURANCE — Construction of Policy. — A canalboat, moored between piers 2,200 feet apart when injured by floating ice, held not lying "between piers," within a policy insuring against damages from ice.— Huntley v. Providence Washington Ins. Co., 79 N. Y. Supp. 35.

130. MASTER AND SERVANT — Contract.—The invalidity of a contract exempting a railroad employer from liability for injuries to the employee, who is a citizen of Texas, when urged as a defense to a suit for injuries in a federal court in Texas, held not affected by the fact that the injuries occurred in Mexico.—Mexican Nat. R. Co. v. Jackson, U. S. C. C. of App., Fifth Circuit, 118 Fed. Rep. 549.

131. MASTER AND SERVANT — Photographs of Wreck. — In an action against a railway company for injuries sustained by a fireman in a collision with another train, the admission in evidence of photographs of the wreck held proper. — Southern Pac. Co. v. Huntsman, U. S. C. C. of App., Eighth Circuit, 118 Fed. Rep. 412.

132. MASTER AND SERVANT — Warning Servants. — A master had a right to assume that his employees, being competent, would not be negligent; and it was not his duty, on employing plaintiff, to inform him of possible or probable dangers in case they were negligent. — Klos v. Hudson River Ore & Iron Co., 79 N. Y. Supp. 156.

133. MECHANICS' LIENS—Mortgages.—Where mechanics' liens are acquired on buildings incumbered on lots, the trust deed is the first lien on the land, and the mechanics' liens are first on the buildings.—Hudson v. Barham, Va., 43 S. E. Rep. 189.

134. MINES AND MINERALS — Forfeiture.—The clause of forfeiture in an ordinary oil lease is for the benefit of the lessor, and no act of the lessee can terminate the lease under the forfeiture clause without the lessors' concurrence. — Henne v. South Penn Oil Co., W. Va., 43 S. E. Rep. 147.

135. MORTGAGES — Deed. — Parol evidence that a deed absolute on its face was intended as a mortgage is inadmissible in a suit at law. — Billingsley v. Stutler, W. Va., 43 Atl. Rep. 96.

136. MORTGAGES—Default of Interest.—A tender of the interest due on a mortgage within the specified time held to preclude an exercise of the option given the mortgagee to declare the whole debt due on a default in the payment of interest.—Schieck v. Donohue, 79 N. Y. Supp. 233.

137. MORTGAGES — Injunction. — A mortgagee has a right to an injunction to prevent the removing from brewery a refrigerating plant, which act would prevent its operation and result in a loss to the business.— Schmaltz v. York Mfg. Co., Pa., 53 Atl. Rep. 522.

138. MORTGAGES—Foreclosure.—Where a mortgagee is in possession, and foreclosure is barred by limitations, resort must be had to an action to redeem from the mortgage debt.—Kelso v. Norton, Kan., 70 Pac. Rep. 896.

139. MUNICIPAL CORPORATIONS — Marriage of School Teacher. — Female public school teacher entitled to certificate of salary, despite her marriage in violation of by-laws of school board of Kings county. — People v. Maxwell, 79 N. Y. Supp. 174.

140. MUNICIPAL CORPORATIONS — Opening Street. — In awarding damages for injuries caused by the opening of street, the jury may consider the effect on the market value of the land, in view of future street improvements. —De Benneville v. City of Philadelphia, Pa., 53 Atl. Rep. 521.

141. NEGLIGENCE — Obstruction of Railway Track. — A railway brakeman is not bound to anticipate that a guy rope will be stretched across the track so low as to throw him off the top of a car. — Iola Portland Cement Co. v. Moore, Kan., 70 Pac. Rep. 864.

142. NEW TRIAL—Discretion of Court.—Granting a new trial at the same term the verdict was rendered is a matter of discretion, from which an appeal does not lie.— Bird v. Bradburn, N. Car., 42 S. E. Rep. 936.

143. NUISANCE — Contingent Danger.—The drilling of a well on adjoining land in close proximity to plaintiff's producing well cannot be enjoined on the danger of ignition of gas by the fires used in drilling the other well. —Pope v. Bridgewater Gas Co., W. Va., 43 S. E. Rep. 87.

144. PARTNERSHIP—Pretended Corporation. — Persons who, pretending to be officers of a pretended corporation, purchase goods in its name and on its behalf, promising to pay therefor, are liable as partners at common law.—Worthington v. Griesser, 79 N. Y. Supp. 52.

145. PARTNERSHIP—Rights of Partners.—Injunction to prevent a firm execution creditor from continuing the business after purchase at execution sale denied at suit of one of the judgment debtors. — Green v. Tuchner, 79 N. Y. Supp. 143.

146. PERJURY—Materiality of Testimony.—An information charging defendant with perjury while a witness in his own behalf on a trial for crime will not be quashed on the ground that his acquittal shows that the testimony he gave was true.—State v. Carey, Ind., 65 N. E. Rep. 527.

147. PRINCIPAL AND AGENT—Action for Money Loaned. —A principal, whose money is loaned by an agent, may sue the borrower though the latter had no knowledge of the agency when he made the loan.— Kitchen v. Holmes, Oreg., 70 Pac. Rep. 830.

148. PRINCIPAL AND SURETY — Indemnity for One Surety.—One about to become a surety with others can stipulate with the principal, without the knowledge of the other, for a separate indemnity for his own benefit. —McDowell County Comrs. v. Nichols, N. Car., 42 S. E. Rep. 938.

149. PUBLIC LANDS—Priority of Grants.— Where there are two grants by the state covering the same land, the second grant conveys no title. — Stewart v. Keener, N. Car., 42 S. E. Rep. 935.

150. PUBLIC LANDS—Trespass.— A defendant, sued for willful trespass in cutting timber from public lands, may show that he acted under advice of counsel, in support of a plea of good faith in mitigation of damages.— United States v. Mullen Fuel Co., U. S. D. C., D. Mont., 118 Fed. Rep. 663.

151. RAILROADS—Negligence. — A person using a public railroad crossing is not bound to assume that the company will negligently back a motionless train against her.— Meeks v. Ohio River Ry. Co., W. Va., 43 S. E. Rep. 118.

152. RAILROADS — Unprotected Platform.—A man employed to deliver the mail at night at a railway station, knowing that the platform was unguarded by any rail,

and falling off the platform, held injured by his own negligence. — Sweet v. Union Pac. R. Co., Kan., 70 Pac Rep. 883.

153. RECEIVERS—Agent's Authority.— Where receivers pleaded a contract by their agent as a defense to an action for services, they were estopped to deny their agent's authority to make a conditional arrangement part of the same contract — Shirk v. Brookfield, 79 N. Y. Supp. 225.

154. RECEIVERS — Appointment. — It does not follow that, because an injunction lies in a suit between hostile titles to land to restrain irreparable damage, a receiver for the land will be appointed. — Freer v. Davis, W. Va., 43 S. E. Rep. 172.

155. RECEIVERS—Compensation —Where a creditor secured the consent of the debtor and other creditors to his appointment as receiver by agreeing to act without compensation, none should be allowed. — Polk v. Johnson, Ind., 65 N. E. Rep. 536.

156. RECEIVERS—Costs and Expenses. — An order discharging a receiver appointed to harvest a crop sown by an outgoing tenant, fixing the liability of the parties for costs and expenses, held not erroneous.— Horn v. Bohn, Md., 53 Atl. Rep. 576.

157. REFERENCE—Correction of Judgment.— Where a judgment of the court at special term is at material variance with the report of the referee, the proper method of correction is by motion in such court.—Shrady v. Van Kirk, 79 N. Y. Supp. 79.

158. REFORMATION OF INSTRUMENTS—Contract of Sale. —Equity cannot reform a written contract expressive of the intent of the parties, except for mistake, accident, undue advantage, or some other equitable ground.— Null v. Elliott, W. Va., 43 S. E. Rep. 173.

159. REMOVAL OF CAUSES—Motion to Remand.—An action for personal injuries, commenced in a state court by service of summons, and removed by defendant before the filing of a complaint, will not be remanded because the complaint subsequently filed prays for damages in less than the jurisdictional amount. — Coffin v. Philadelphia, W. & B. R. Co., U. S. C. C., S. D. N. Y., 118 Fed. Rep. 688.

160. SHERIFFS AND CONSTABLES— Free Bills.— A constable is liable on his bond for officers' fee bills put into his hands for collection where the parties have promised to pay such bills. — State v. Barnes, W. Va., 43 S. E. Rep. 131.

161. SPECIFIC PERFORMANCE — Parol Agreement. —A parol agreement to devise real estate will not be specifically enforced, unless the proof be clear as to the nature and specific character of the contract. — Braum v. Ochs, 79 N. Y. Supp. 100.

162. SPECIFIC PERFORMANCE—Parol Gift of Land.— To entitle a purchaser to specific execution of a parol contract for the sale of land, the contract must be definite, and part performance must have been made in pursuance of the contract.—Stone v. Hill, W. Va., 43 S. E. Rep. 92.

163. SPECIFIC PERFORMANCE — Venue.— An action to compel the specific performance of an agreement to convey land held an action *in personam*, to be brought in the county where the defendant resides, under Civ. Code, § 47.—Close v. Wheaton, Kan., 70 Pac. Rep. 891.

164. SPECIFIC PERFORMANCE — Verbal Contract. — Where the part performance of a verbal contract of lease consisted only of improvements for which compensation could be made in money, equity would not decree specific performance. — Henley v. Cottrell Real Estate Ins. & Loan Co., Va., 43 S. E. Rep. 191.

165. STATUTES—Title of Act.— Act June 6, 1893, relating to the care and burial of paupers by counties, held defective for want of a sufficient title. — Dailey v. Potter County, Pa., 53 Atl. Rep. 498.

166. STREET RAILROADS — Negligence. — Where the negligence of one injured in a collision with a street car entered into the accident, he may not recover, though defendant was also guilty of negligence.— Cox v. Wilmington City Ry. Co., Del., 53 Atl. Rep. 563.

167. TELEGRAPHS AND TELEPHONES — Construction of Contract.—The respective rights of a telegraph and railroad company, on the termination of a contract between them for the construction and operation of telegraph lines, considered and determined.—St. Paul, M. & M. Ry. Co. v. Western Union Tel. Co., U. S. C. C. of App., Eighth Circuit, 118 Fed. Rep. 197.

168. TELEGRAPHS AND TELEPHONES — Failure to deliver.—In an action for delay in delivering a telegram, the sender held not entitled to recover special damages for loss of work alleged to have resulted therefrom.— Western Union Tel. Co. v. Pallotta, Miss., 32 So. Rep. 310.

169. TENANCY IN COMMON — Ejectment.—A tenant in common may maintain ejectment against a third person. Shelton v. Wilson, N. Car., 42 S. E. Rep. 937.

170. TRADE-MARKS AND TRADE-NAMES—Sapolio.—The trade-name "Sapolio" held infringed by the use of the word "Sapho" as the name of a similar article, in connection with such similarity in the packages as to deceive ordinary purchasers.—Enoch Morgan's Sons Co. v. Whittier-Coburn Co,. U. S. C. C., N. D. Cal., 118 Fed. Rep. 657.

171. TRIAL—Province of Court and Jury.—The sending of the jury to the pleadings for the matters in controversy, where the pleadings contain important and intricate averments, for some of which no proof was offered, was material error.—Stevens v. Maxwell, Kan.. 70 Pac. Rep. 873.

172. TRIAL—Renewal of Motion.—The refusal to strike out incompetent testimony cannot be assigned as error, where the court stated that it would be expunged unless other testimony was introduced thereafter to render it competent, and the motion was not renewed.—Bailey v. Warner, U. S. C. C. of App., Eighth Circuit, 118 Fed. Rep. 895.

173. TRIAL—Sufficiency of Evidence.—A party who does not move for the direction of a verdict in his favor thereby admits that there is some evidence upon each material issue which should properly be considered by the jury.—Freese v. Kemplay, U. S. C. C. of App., Eighth Circuit, 118 Fed. Rep. 428.

174. TRUSTS—Extinguishment. —A deed of a trustee to beneficiaries followed by adverse possession held to extinguish the trust and the trustee's title.—Taft v. Decker, Mass., 65 N. E. Rep. 507.

175. UNITED STATES MARSHAL — Credibility of Witness. — The mere fact that a witness for the defendant in a proceeding for deportation is himself a Chinese person does not render him an interested witness within the rule which permits interest to be considered as a discrediting circumstance.—United States v. Lee Huen, U. S. D. C., N. D., New York, 118 Fed. Rep. 442.

176. VENDOR AND PURCHASER — Vendor's Lien.—One who took a mortgage on land, with knowledge that a portion of the price therefor had not been paid, took subject to the vendor's lien. — Harter v. Capital City Brewing Co., N. J., 53 Atl. Rep. 560.

177. WITNESSES—Prosecuting Attorney.—A prosecuting attorney may be a competent witness for the state in a criminal action. — State v. Wilmbusse, Idaho, 70 Pac. Rep. 849.

178. WITNESSES—Refreshing Memory. — A physician may properly refer to a memorandum made at a time of visiting a patient to refresh his memory as to the condition of the patient at the time of such visit.—Bailey v. Warner, U. S. C. C. of App., Eighth Circuit, 118 Fed. Rep. 895.

179. WITNESSES — Statement of Physician.—Where a physician examines a person, it will be presumed that the relation of physician and patient exists, and that the information he obtained was for the purpose of enabling him to prescribe and act for the patient.—Munz v. Salt Lake City R. Co., Utah, 70 Pac. Rep. 852.

180. WITNESSES — Testimony in Foreign Tongue.—The fact that a witness testified in the foreign tongue is no ground for reversing a conviction, where it is not claimed that his testimony was not correctly interpreted.—Commonwealth v. Greason, Pa., 53 Atl. Rep. 539.